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SIR JOHN MACDONELL, C.B., LL.D.,

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—ARIST. *Pol.* II. 1.

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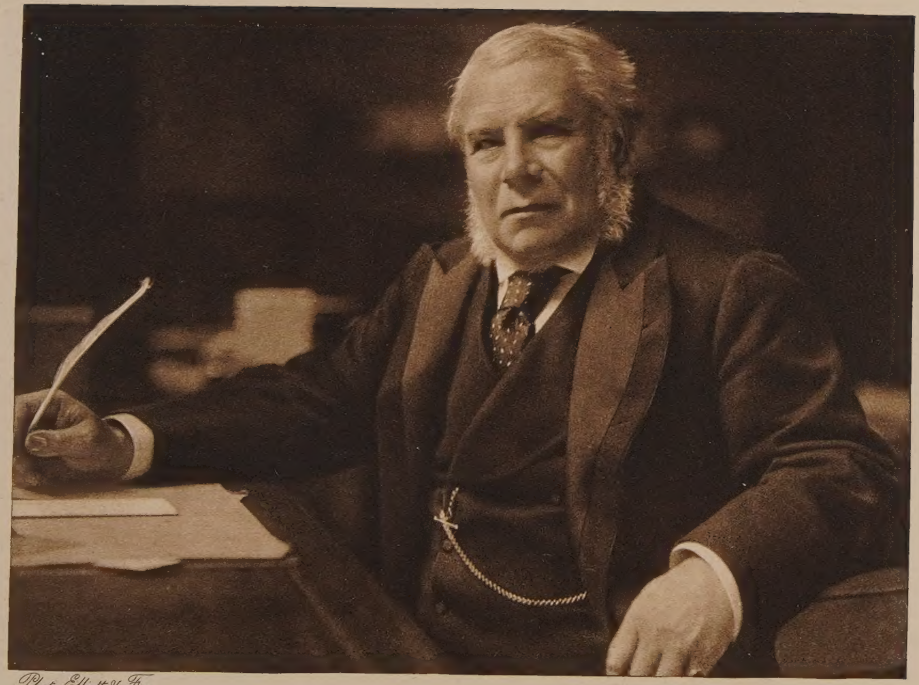

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THE RIGHT HON. LORD MACNAGHTEN.

LORD MACNAGHTEN was born in 1830, and belongs to a Scottish family which settled in Ulster in the sixteenth century, and of which several members have attained to distinction. He is a nephew of the Sir William Macnaghten whose tragical death outside the walls of Cabul on the Christmas Day of 1841 was one of the prominent incidents of the first Afghan War. He shares with the present Lord Chancellor the honour of being a University First Class man and a University "Blue." In 1852 he was bracketed Senior Classic with two other Trinity men, and obtained the second classical medal, the first having fallen to his lifelong friend Benson, afterwards Archbishop of Canterbury. At the same time he was rowing for two successive years in the Cambridge "Eight," first as bow, and afterwards as stroke. He was called to the Bar at Lincoln's Inn in 1857, practised as a Chancery barrister, was made a Q.C. in 1880, and became a leading counsel in the Court of the Master of the Rolls, then a Chancery judge. The year in which he took silk was also the year of his election to the House of Commons. He represented his native county, Antrim, from 1880 to 1885, and the northern division of that county from 1885 to 1887. In the latter year he leapt at a bound from practice at the Bar to the position of Lord of Appea and for the last thirty years he has adorned, dignified, and strengthened the highest court of appeal. Lord Macnaghten's judgments are not only good law but good literature. There is racy humour in them, in addition to their learning and their sound, solid, subtle reasoning, and the year permeated by a flavour of fine scholarship, which gives them brilliancy and distinction, and makes them excellent reading. Since 1895 Lord Macnaghten has been chairman of the Legal Council of Education.

C. P. I.

THE LATE LORD DAVEY.

[*Contributed by* The Right Hon. Lord Macnaghten, G.C.M.G.]

Even now, after the lapse of some months, it is difficult to measure the loss which the highest Courts of this realm and the whole domain of English law have suffered by the death of Lord Davey. It was not given to him to fulfil the promise of his earlier days, and to reach that position which at one time we all thought he was destined to attain. But at least he is secure in the reputation of a consummate advocate, a great master of equity, and a courteous, patient, and most learned judge.

Lord Davey's professional career began and ended within the limits of my own, so that of men now living few, if any, have had better opportunities of judging of his ability and work. It is no little satisfaction to me, if I may be forgiven for speaking of myself, to be permitted to offer a tribute of admiration and affection to the memory of so old a friend and so valued a colleague.

I met Horace Davey first in the chambers of the late Vice-Chancellor Wickens, where I had been a year or two before. I recollect being told by my master and his that at last he had found a pupil of whose success he felt assured. His confidence was certainly not misplaced. In a very short time Horace Davey gained a commanding practice behind the Bar. But it was not until he took silk—a step on which he ventured with strange misgiving and much hesitation—that he outstripped all his companions in the race.

Not long after Davey became a Q.C. I well remember being in Court one day when a case was at hearing which created a great stir at the time. The famous question of Lord St. Leonards' missing will was in debate. It was only as an onlooker and an idler that I was there. The Court was crowded. The front row was crammed with leading counsel from the Court of Probate, the Common Law Courts, and the Equity Bar. There had been a good deal of talk going on for some time and no little repetition. The judges were getting impatient. Everybody was beginning to feel rather bored when Davey rose to address the Court. He was so self-composed, his language was so well chosen, his argument so lucid and concise, that the attention of every one present was riveted at once. I have always thought it was one of the best things I ever heard done. From that time

onwards, until he became a judge more than twenty years later, there was no case of importance in the Court of Chancery in which he was not retained. In the House of Lords and the Privy Council his services were no less in request. He was never dull or tedious. He always knew his case thoroughly. Nothing came amiss to him. Nothing was too small for his attention. Nothing was too great for his powers. He seemed as much at home in arguing a point of practice as he was in explaining a complicated invention or illustrating and applying one of the great principles of equity or dealing with the mysteries of ecclesiastical law or some constitutional question before the Privy Council or the Committee of Privileges.

During the short time he sat in the Court of Appeal the reputation of that tribunal, high as it was, was largely increased. And no one knows better than one of his colleagues how much he added to the strength of the House of Lords and the Privy Council, or what weight of authority was lost and what wealth of learning perished when the grave closed over the most accomplished lawyer of his day.

THE MUNICIPALITY.—I. AUSTRIA: THE COMMUNE SYSTEM[1]

[*Contributed by* Prof. Dr. Joseph Redlich, *Vienna.*]

Introduction.—Among the great continental systems of municipal law the Austrian Commune Law holds a peculiarly individual position and one which is but little known outside its own boundaries. In particular I believe that practically nothing is known in the countries under English law of the characteristic legal organisation of the Austrian communes and of its absolute distinctness from the Prussian and other German laws and communal regulations. It may then be of value to English lawyers and statesmen to learn the essential principles of this Commune Law. And, on the one hand, its characteristic development during the nineteenth century offers important assistance to an understanding of the general development of the Austrian government; while, on the other hand, English people may be interested to learn what a remarkable alteration the concept of local self-government has undergone in Austria and in her Commune Law, since this concept had, at any rate, its ultimate source in England.

But in order to understand the Austrian Commune Law it is essential to make a survey of the general political and legal conditions under which it developed in the past and has reached its present form.

I. History of Austrian Communal Legislation.

It is not proposed to give even a summary account of the origin and development of communes in the Austrian hereditary states. For although the connection was a loose one, these states merely formed a part of the

[1] *Literature.*—Brockhausen, *Die österreichische Gemeindeordnung*, Vienna, 1906; Ulbrich, *Oesterreichisches Verwaltungsrecht*, Vienna, 1904; Mayerhofer, *Handbuch für den österreichischen Verwaltungsdienst*, especially vols. i. and ii.; Beidtel, *Geschichte der österreichischen Staatsverwaltung 1740–1848*, Innsbruck, 1896; *Oesterreichisches Staatswörterbuch*, Articles *Gemeinden*, *Städtestatute*, *Finanzwesen*, *Heimatrecht*; see especially the 122nd volume just published of the *Schriften des Deutschen Vereins für Sozialpolitik*, edited by Dr. Joseph Redlich; *Die Verfassung und Verwaltung der österreichischen Städte*, Leipzig, Duncker & Humblot, 1907. *Authorities for Laws.*—(1) *Gemeindegesetz* of March 5, 1862 (Manz edition 1896), together with the *Gemeindeordnungen für alle Kronländer*; (2) *Städteordnungen*, edited by Brockhausen (Manz 1895); (3) *Heimatgesetz* of December 3, 1863, and of December 5, 1896; (4) *Gemeindestatut* for Vienna, according to the Law of March 24, 1900, and its *Wahlordnung*.

ancient German Empire up to the time of its decay, and thus the history of their political organisation is only a branch—a peculiar branch, it may be—of German legal and constitutional history as a whole. As regards the communal system in particular it is of course well known that many diverse local laws and local institutions existed within the wide boundaries of the old Empire. But at bottom all these various local laws are only modifications of the few fundamental principles which controlled all the political organisations of the continent before the French Revolution.

The ancient German communal liberties in the plain districts had everywhere been reduced to insignificant proportions by the estates of the realm, and the privileged position given to the seignorial nobility in consequence. In France, Germany, and Austria since the fourteenth century the peasant had been losing more and more of his rights, and in the same way the village commune had sunk to a mere domain under the feudal system, in which the landowner with his economic, judicial, and administrative powers completely eliminated the central Government for the great mass of the population.

This state of things altered little if at all when the second great political change under the *ancien régime* took place—that is, when the rise of a strong territorial sovereign power gradually put an end to the political force of states. On the contrary the perfection of development which was reached by the German sovereign states in the seventeenth and eighteenth centuries served to maintain the political privileges of the feudal landowners, although since the middle of the eighteenth century an enlightened absolutism strove persistently to improve the social and legal position of the peasantry. And not only so, but it was actually the supporters of the increasing despotism of the sovereign, the territorial officials, who succeeded in destroying the last remnants of municipal freedom in the towns themselves.

This explains the fact that, of the German monarchs of the eighteenth century, the two greatest, Joseph II. and Frederick the Great, both alike promoters of a centralised and bureaucratic government, were also the final destroyers of municipal liberty. It is no mere chance then that the first important reform carried out by the great Prussian reformer, Freiherr von Stein, after the division of the Prussia of Frederick the Great in 1806, was the Municipal Regulation of 1808. In this regulation the modern principle of municipal self-government was put into practice for the first time on the European continent.

In Austria, however, communal liberty was still withheld, and the political tutelage of the bureaucracy continued undisturbed. The period of that complete political stagnation which will always be connected with the name of Prince Metternich, and which ran its course undisturbed after the Congress of Vienna, not merely preserved the existing state of things, but actually solidified it.

Thus Vienna, the old Imperial capital, continued to be governed by the magisterial constitution (*Magistratsverfassung*) introduced by Joseph II. in 1763, which practically made any real municipal self-government impossible, and indeed converted the administration of the town into a part of the police administration of the central Government. And the condition of the other large towns of the Empire was no different.

The revolution of 1848 wrought a complete and sudden change in this matter in Austria. Then for the first time a serious attempt was made to fashion the group of countries ruled by the House of Hapsburg into a united modern State, and to replace absolutism by a modern parliamentary government. Then, too, the personal liberty of the citizens, their freedom from the economic and moral guardianship of the old police government, was violently demanded and hastily granted by the feeble supporters of despotism. And so also the demand for the freedom of the communes and for self-government was raised everywhere in town and country. In the villages the cry was for a modification of the feudal patrimonial government exercised by the landowners—for the last half generation under central control, it is true—as judicial and administrative authorities.

The celebrated Patent of September 7, 1848, as a matter of fact secured the freedom of the Austrian peasant; and after this a complete transformation in local administration throughout the Empire was inevitable. This latter task was not, however, accomplished by the revolution, which in Austria was not able to bring about directly the reconstruction of the Government. The new Commune Law which was drafted by the first Ministry after the revolution and was issued on March 17, 1849, was nevertheless, in its whole inspiration, entirely the fruit of the revolution.

The historical origin of this first Austrian municipal law must be clearly understood and its consequences correctly deduced before any adequate judgment can be formed of this legislation and of the enduring principles on which Commune Law in Austria is based.

Its history explains, too, why the law is preceded by a number of concise axioms stating the fundamental rights of the commune, and beginning with the words, "The free commune is the fortress of a free country." In this declaration of the fundamental constitutional rights of the commune the Austrian legislation of 1849 followed the example set it by the Frankfurt Parliament, the first popular assembly representative of the whole German nation. In the resolutions of this Parliament on the "fundamental rights of the German people," as they are given in the Imperial Constitution, the fundamental rights of the communes have their place.

The adoption of these opinions by the Austrian legislation of 1849 made the mature ideas of German liberalism concerning self-government an enduring foundation for the Austrian communal system. The states forming the new German Empire, on the contrary, not only did not adopt

this principle in their legislation, but have fallen further and further from it during the course of the nineteenth century.[1]

The primary object of this law was to base the Austrian government organisation, now entirely freed from the remnants of feudalism, upon a foundation of self-governing communes, so far, that is, as regards the lower social and political branches of that organisation. "Commune" (*Gemeinde*) was here used in the widest sense of the word *communitas*, and the administrative organisation was so conceived that above the township commune (*Ortsgemeinde* were placed the district (*Bezirk*) and circle (*Kreis*) communes. Within these communes the duties of administration were to be carried on, as it were, in concentric circles, by the free initiative of the citizens. In addition the Kronlands [2] were preserved as historic unities, and for them the constitutional principle was to be realised through the Diets (*Landtage*), while the central Government prepared to organise a new system of local and central administration. Thus the whole organisation appeared sufficiently complicated, built up, as it was to be, on a combination of central and provincial legislation and of central administration and local self-government. As a matter of fact, only the law for the township communes was at once carried out. As the result of it the formation of thousands of communes as free self-governing bodies was taken in hand during the years 1849 and 1850. This Commune Law applied equally to cities, market towns, and villages. An exception was made only for the Imperial capital (Vienna), for the provincial capitals and for a few of the other large towns. It was proposed to confer on them special statutory local regulations, and this was actually done. The first city charters (for Vienna, Brünn, Prague, Triest, and Görz) appeared in 1850 and showed what was to be the most important characteristic of this special local communal organisation. It was that the towns in question were placed outside the administrative power of the local State administrative authority and were directly under the provincial government. If an attempt is made to determine at this point what characteristics in this law and afterwards constitute the lasting freedom of the communes in Austria, the answer must be: this freedom is expressed above all in the legal position of the commune in relation to the State, or to put it better, in relation to the central Government. In this law we find already the idea of the commune in Austria as territorially not a State administrative division, alterable at will, but an independent unity within the State, due to historical and natural facts. Similarly the law of 1849 embodies the principle

[1] § 184 of the Frankfurt Imperial Constitution runs thus: "Every commune has as the fundamental rights of its constitution (*a*) the election of its headman (*Vorsteher*) and representative; (*b*) the independent administration of its communal affairs, including the management of the local police, under the control of the Government as regulated by law; (*c*) the publication of the communal budget; (*d*) the publicity of its assemblies as the general rule.

[2] "Kronland" is the legal *terminus technicus* for the old single provinces out of which Austria is formed.

on which the organisation of the Austrian commune has since rested, and according to which the commune is a true local self-governing body, since everything that it actually and legally takes in hand is accomplished by a body directly representative of its members. The formation of this representative body and the choice of its leader, the village headman (*Gemeindevorsteher*) or burgomaster, is managed without exception through the votes of the members of the commune without further interference from the Government authorities.

Finally as regards the legal competence of the commune, the law of 1849 already states the idea which has formed the enduring principle of Austrian Commune Law. According to this the commune's sphere of activity falls into two divisions—the one natural to it, the other deputed to it by the Government. The first division must be understood to include all those activities "for which the commune is qualified by its existing powers." And finally here is stated the important principle that as regards this "natural sphere of activity," representing the independent life of the commune, Government control is limited to the maintenance of the general laws of the State.

There can be no doubt that this law was intended primarily to codify a definite theoretical doctrine—the doctrine, in fact, of self-government through free communes, as it was formulated in Germany in the first half of the nineteenth century under the influence of western European liberalism, and more especially of the theory of *pouvoir municipal* which had spread from Belgium and France. There can be no doubt either that the municipal theory thus raised into a law in Austria was directly opposed to the character which historical events had given to the Austrian administration of that time. And it is not surprising therefore that this law had hardly been granted to the Austrian people before it was once again taken away. The re-establishment of absolutism in its modern form which followed immediately upon the suppression of the revolution in Austria and Hungary brought with it a comprehensive reorganisation of the central and local administration. This was accomplished with extraordinary rapidity and skill under the guidance of Dr. Alexander Bach, the leading Austrian Minister at that time.

This new Austrian administrative organisation was calculated to serve the leading political ideas of that period, and was therefore chiefly characterised by a far-reaching suppression of personal political liberty as well as of all the social and political forces set free for the first time in Austria by the revolution. Obviously there was no place for free communes in a country which was to be firmly governed by a hierarchy of officials on a uniform centralised system.

The Commune Law of 1849 was thus suspended, and in the same way the constitution granted to the Empire on March 4, 1849, was never acted upon and was actually rescinded on December 31, 1851.

It was only the great political crisis due to the foreign policy of the Imperial Government in 1859 and its result, the unlucky war with France and Piedmont, which put an end to this state of things, and opened up a way once more not only for Austria's constitutional existence, but also for the development of freer administrative institutions.

How quickly, and at the time unexpectedly, the change in Austrian home policy proceeded is shown distinctly in this very matter of Commune Law. A new law was drawn up by the Bach Ministry after prolonged study, and was issued in May 1859. It embodied quite other ideas on the Commune Law than those of 1849, inspired by the revolution. Influenced no doubt by the reactionary legislation in Prussia (1853), this great law, presenting as it did a formal code of the Commune Law, aimed at a regulation of the communal system in town and country, carried even into details, in such a way that the principle of self-government was only allowed play within very modest limits. Rather everything was so ordered as to leave with the Minister of the Interior and the Government bureaucracy extended authority for the supervision and guidance of the communes.

But this law disappeared almost as soon as it came to the surface. One of the first legislative tasks suggested by the Government itself to the newly constituted Austrian Parliament, which was based on the constitution of February 26, 1861, was the drafting of a new Commune Law.

This came into existence after, it is true, very considerable alterations had been made in the Government proposal, and as the Imperial Commune Law of March 5, 1862, has formed since then the legal basis of the whole communal system throughout the Austrian territories. It must not be thought, however, that this law directly regulated the constitution of the communes in the different provinces. The law of March 5, 1862, was more concerned to furnish a summary of the main principles of the Commune Law, formulated in twenty-six articles, upon which foundation the Diets in the Kronlands drew up, in the course of the years 1863 to 1867, the different regulations for the Communes in each particular province.

In this way Austria possesses, in addition to the Imperial Commune Law, sixteen territorial commune regulations. All these laws are, however, based upon a single draft law authoritatively presented to all the Diets by the Government, and besides this, all important problems in Commune Law are determined, alike for all the Kronlands, by the Imperial Commune Law; consequently the differences between these numerous provincial laws are small, and have practically no important significance. It is true that since the alteration in the constitution in 1867, commune legislation in Austria has everywhere been placed completely within the competence of the Diets, and in some of the Kronlands important changes in the territorial commune regulations have subsequently been made. But as the Imperial Commune Law still remains in force, the difference between the Commune Laws in the various provinces continues to be very small.

Neither the Imperial Commune Law nor the territorial Commune Regulations have affected in any way the continuance of the above-mentioned special municipal communal regulations—city charters which had been issued for Vienna, and also for all the provincial capitals, and for a number of the larger towns; on the contrary, the number of these statutes has somewhat increased of late. But, in addition, especially during recent years, this special local municipal system has been altered to a considerable extent by the various territorial laws. This in particular has happened in the case of the Commune Regulation for the Imperial capital, Vienna (1900). But it is worth noticing that the general Imperial Commune Law gives for the first time an exact definition of the two-fold nature of these municipal regulations. Art. XXIII. says with reference to this point: "Cities and electoral districts (*Kurorte*) which have their own charter manage their affairs through their representative authority; they are directly under the territorial committee (*Landesausschuss*) or the Deit as the case may be, and with regard to the sphere of activity deputed to them by the Government, they are under the territorial authority (*Landesstelle*)."

A more detailed account of the charters will be better deferred until the third section.

II. General Account of the Existing Commune Law in Austria.

Introduction.—The main tendencies and fundamental characteristics of the Austrian Commune Law, as they are connected with the origin of the law just described, can be best presented in an order similar to that followed in the communal regulations themselves. Here, however, a few preliminary words must be said as to the main idea which has inspired and is embodied in the Austrian Commune Law: the *idea of autonomy.*

The Austrian commune is, according to the existing law—as has been already explained with regard to the older law of 1849—a free, autonomous commune—that is to say, it is no mere administrative district of the Government, formed specifically through a limited representation of the citizens. Neither is it a subordinate division, under central control, of the administrative organisation of the Government, nor is it a body dependent for its inspiration on other factors or the Government, or adopting its standards from them. The Austrian commune, on the contrary, is an attempt to put into practice the fundamental idea which forms a constituent part of the whole theory of continental liberalism: the idea that the commune, both in origin and character, is, within certain limits, independent of the central Government, and that there belongs to it—of course under the sovereignty of the national law—a particular sphere of the political and social life, within which it looks after and promotes its own interests

in freedom, *i.e.* through the decisions of its members in their representative organisation.

In order to obtain a clear grasp of the conception of autonomy, which plays a quite characteristic part in the Austrian Constitution and in Austrian political life, it is necessary to point out its further significance. Not only the communes but also the higher administrative bodies in Austria are most carefully constituted as autonomous corporations. This applies to the districts (*Bezirke*) as a group of communes, which are a form of corporate local administration confined however to a few of the Kronlands (Bohemia, Steiermark, Galizia), and without exception and in the highest degree to the so-called *Kronlands*.

Modern Austria as a State consists of a group of ancient countries whose boundaries have endured for centuries practically unchanged, which the reigning dynasty since its investiture with the ancient Ostmark in 1282 have from time to time inherited by different legal titles and united into one whole. The historical and political individuality of each of these countries, which displayed itself most strongly under the rule of the estates of the realm (*Ständewesen*), was, it is true, enormously diminished in practical importance by the absolutism of the seventeenth and eighteenth centuries, but was never formally put an end to. Since the beginning of a constitutional life in Austria these ancient states have found new birth and continuity in the Diets, reconstituted as they are on the representative system and in accordance with the principle of representation of interests, even if they are but subordinate members of the whole Imperial and central Constitution. More especially in the territories which were formerly the kingdom of Bohemia, the awakening of national feeling among the Tschechs since the middle of the nineteenth century has powerfully contributed to encourage the belief in a far-reaching political and administrative independence of these countries within the combined Austrian State.

The Austrian territories according to the Imperial Constitution of 1861 and 1867 are not provinces. They are described as Kronlands (so-called), independent within the limits of their territorial constitutions (*Landesverfassung*), and possessing in their Diets what are in fact legislative bodies—provincial parliaments—and which carry on the territorial administration constitutionally belonging to them, free from the interference of the Government central authority, by means of the territorial committee (*Landesausschuss*)—that is the permanent executive committee formed from their members.

The principle of public law and administration which is herein expressed will now be designated "autonomous." Territories and communes are autonomous in Austria—that is, they possess legal and constitutional powers to pursue the interests and the tasks secured to them by the territorial constitution or by the communal regulation as the case may be; and to pursue them freely according to their own desires through their repre-

sentative body, by means of legislation and administration so far as concern the territories, by means of administration alone so far as concerns the communes.

The guiding principle of autonomy in its various aspects is embodied in each of the different fundamental features of the Austrian communal system. It is hoped that the following description may illustrate this sufficiently:

(*a*) **The Township Commune (Ortsgemeinde) in General.**—Legally the Austrian commune possesses the following characteristics:

1. It must have as a basis a territory distinctly marked out by natural boundaries.

2. It consists of the commune association (*Gemeindegenossenschaft*) settled on this territory—that is, of all those persons who, according to the Commune Regulation, rank as members of the commune.

3. It carries on within this territory the public duties specified by law as the sphere of activity of the commune, by means of authorities elected from the communal associates.

The Austrian commune is a township commune—that is, it is bound up with the units resulting actually and historically from the distribution of the population. This does not, however, mean that all townships (*Ortschaften*) are communes. The existing law, on the contrary, defines the territorial basis of the communes by reference to the first constitution of communes according to the law of 1849. This, except for Galizia, was accomplished in 1849 and 1850 and formed the first important creative act of the reconstituted central administration of the Government. This determination of the communal territories is itself closely bound up with the old order of things, since as a rule the so-called "registered communes" (*Katastral Gemeinde*) were made into township communes. And these registered communes had their origin in the general adjustment of the land tax carried out by the Emperor Joseph II. through the Patent of April 24, 1785.

Now these registered communes, and also the township communes based upon them in 1849, in many cases were formed from a combination of two or more townships. The question therefore at once arose whether it was possible to alter the territorial divisions of the Austrian communes which had been thus made. This question of the unification and separation of communes has been solved in Austrian law in logical agreement with the principle of autonomy. The communes can, as a rule, only be combined or separated with the consent of the communes in question. The unification may be either complete, so that the two communes are replaced by a single new one, and the property of both is also united; or it may be only partial, in which case public business is carried on in common, but the property remains separate. In this case both townships continue to rank as legal individuals in public law. The unification of communes is not sanctioned by the

central Government, but by the superior authority of self-government, the territorial committee (*Landesausschuss*).[1] Legally every Austrian commune, whether urban or rural, large or small, possesses the same character—that is, it is a legal person in private as well as in public law. As such it possesses full legal powers both at civil and public law.[2] In particular the legal powers of the Austrian commune to own and to inherit real property are in no way restricted.

(*b*) **Membership of the Commune.**—It is not easy to describe briefly the legal relations of individuals to the commune. But apart from this consideration we can see that the Austrian commune, as a corporation recognised by public law, possesses and exercises within definite legal limits a certain degree of public authority, granted to it by the Communal Regulation and other similar laws, over all persons whether citizens or aliens (*Ausländer*) who are within its territories. We can explain the details of this authority better at a later stage, when discussing the competence of the commune. Here it will suffice to point out that the Austrian commune as such controls the entire police force in the district, and can consequently legally lay commands and prohibitions upon any individual within its territories.

For the rest Austrian law describes the legal relations of individuals to the communes as follows under the following categories. It distinguishes:

(*a*) Members of the commune.

(*b*) Strangers.

The first class forms as a whole the association of persons within the commune, and as such falls into two classes:

(*a*) The persons attached to the commune.

(*b*) The associates of the commune.

Attachment to a commune (*Gemeindeangehörigkeit*) denotes, according to Austrian law, the permanent legal relationship in which an Austrian citizen stands to a commune, in that he has either been expressly admitted within its association, or is legally descended from some one attached to the commune and thus has obtained his right *ipso jure*.[3] This legal relationship is called the law of settlement (*Heimatrecht*), and was decreed almost simultaneously with the re-codification of the Commune Law in a special Settlement Law of December 3, 1863. It should be noted that this Settlement Law is an Imperial law and that its alteration is not within the competence of the separate provincial diets. It is naturally of great importance to the State that this fundamental right of every citizen—for according to

[1] The *Landesausschuss* is the Executive Committee of the Diet (*Landtag*) appointed from its members to manage the permanent business of the territorial administration (*Landesverwaltung*), which is autonomous—that is, independent of the central administration.

[2] Obviously the commune is not capable of committing a criminal offence.

[3] There may be yet a third case: acquisition of settlement by officials of the central Government or of the territories, by clergy, and public schoolmasters who enter the commune on account of their office and have their permanent residence there.

Austrian law every citizen must have a legal settlement in some commune—should be regulated on similar principles throughout its territory.

The term "communal association" (*Gemeindegenossenschaft*) includes all those persons who, without having a legal settlement in the commune, either

(*a*) possess real property within its territories; or

(*b*) pay direct taxes on account of an industry carried on there.

The legal rights of these different classes of persons within the commune are graduated as follows:

1. All, whether members of the commune or strangers, in whatever commune within the Empire they may live, possess the right of residence and of free choice of occupation.[1]

2. But only those attached to the commune, and as a rule its members, whether it is their place of settlement or merely their residence as the case may be, have an absolute right to undisturbed residence. All other persons—all, that is, who live in a commune without paying direct taxes there or having a legal settlement there—may be expelled from the commune by a resolution passed by the representative authority, if they are in receipt of poor relief from the community or have lost their reputation (through a conviction in a court of law).

3. Those attached to a commune alone have the right to receive poor relief from the commune in which they have a settlement.

4. Membership of a commune in principle carries with it enfranchisement and eligibility for election [2]—that is to say, the group of those attached to the commune and the group of those who pay direct taxes in it make up, properly, the circle of active citizens. But in practice attachment to a commune, as we shall see later, is almost or quite valueless, so far as the share taken by the great mass of the people in the public life of the commune is concerned. For the Territorial Commune Regulations require, as a rule, other qualifications besides "attachment" to the commune, such as the exercise of a Government or a public office, the holding of a doctor's degree, etc., or even the payment of taxes from those who claim the electoral franchise in the commune.[3]

[1] Art. 6 of the fundamental law (*Staatsgrundgesetzes*) concerning the common rights of citizens states expressly: "Every citizen may make his residence and dwelling in any township in the Empire, may acquire real estate of any kind, may dispose of it freely, and may carry on any occupation under lawful conditions."

[2] In order to prevent any possible encroachments being made by the provincial legislation in this matter upon the fundamental liberties of the State, the fundamental law concerning the common rights of citizens explicitly enacts in Art. 4: "All citizens who live in a commune and pay taxes there on real property, earnings, or income possess the right to elect for and be elected to the communal representative body under the same conditions as those attached to the commune."

[3] In this connection the peculiar form acquired by the conditions of legal settlement during the last decade must be noticed. Since, according to the law of 1863, settlement or attachment to another commune can only be obtained through direct admission granted

In addition to the classes of persons in the communes already mentioned, there are also in the cities and market towns the so-called freemen (*Bürger*). The status of freeman is obtained by admission granted by the commune, and follows on the payment of a tax; but from the point of view of public law there is no difference between freemen and other members of a commune. The only distinction is that the former alone are entitled to a share in the institutions, endowments, and property which have belonged to the freemen from ancient times.

Cities and market towns also have the right of conferring the privilege of honorary freedom, which enables those Austrian citizens concerned to enjoy all the rights of membership and of freedom of the commune without the corresponding burdens.

(*c*) **The Organisation of Communal Representation (Gemeindevertretung).**—The fundamental rights of the commune, as expressed in the Commune Law of 1849, themselves embody the principle of free election of representatives. And in fact, in the existing law also, the special characteristic of the Austrian commune, that its authoritative agents are chosen freely and entirely by election; and this is true of all three of the authorities which together make up the organism of the Austrian commune—that is, the communal council (*Gemeindeausschuss*), the executive board of the commune (*Gemeindevorstand*), and the burgomaster or headman (*Gemeindevorsteher*).

The communal council is elected by those entitled to vote in the commune. The right of voting is confined to Austrian citizens. Women are entitled to vote if they pay direct taxes, but they must not vote in person, but must exercise their right through an agent. In the case of married women, either the husband acts as agent or his consent is necessary to empower a third person.[1] Persons who pay taxes in the commune but are not resident there (out-voters) are entitled to vote, and can also exercise their right through an agent.

As has been already noticed, membership of a commune in theory carries with it the unconditional right to vote, but in practice, in the majority of

by the commune itself, and since the right to demand poor relief is obtained with it, it is clear that the working classes, if they leave their original home, will never obtain a settlement in their new place of residence, however long they may live there, because the communes avoid, for financial reasons, voluntarily burdening themselves with the responsibility of poor relief for the incoming population. The result of this has been that during the last half of the nineteenth century, owing to the great social and economic changes and the consequent shifting of population in the country, the legal settlement of the people, especially in the towns, has completely lost its connection with their actual place of residence, and with the fact that they live in any particular commune. A new regulation made in 1896 attempts to lessen the serious evils resulting from this state of things by granting the right to obtain a legal settlement in a place to any one who has lived there ten years. The acquirement of legal settlement in this way, *ipsa lege*, in the place of residence has somewhat improved matters, if it has not cured the evil.

[1] Gemeindewahlordnung, § 4.

cases, only those persons are entitled to vote who pay any form of direct tax in the commune.[1] There is no need for the taxpayer to reside in the commune, and large landowners are thus entitled to vote in all communes in which they have estates.

In those Kronlands, such as Istria and Moravia, where a property qualification is demanded, it is an exceedingly small one. In the majority of Kronlands there is no such fixed minimum, so that any payment of a direct tax, however small, suffices to secure the right of voting in the commune. The result is that throughout Austria the lower middle class possesses communal enfranchisement, and in the smaller towns and villages the electorate includes those members of the working class who are settled there. In the large towns and industrial centres, it is true, the conditions of residence are such that the masses remain disenfranchised. On this account in Vienna and some other large towns a special residence qualification has been recently introduced, which allows the working classes, if in a limited degree only, to send representatives to the communal representative authority.

The election of the communal council by the communal electors takes place in a manner which still more markedly favours the propertied classes. The electors are divided into three electoral bodies in such a way that the total amount paid in taxes in the commune is divided into three parts: the electors whose payments make up the first third part form the first electoral body, those whose payments make up a second third part form the second electoral body, and the remainder form the third. In this way three electoral colleges differing extraordinarily in numbers are formed. Each of these elects an equal number of members of the communal council. The size of the latter varies according to the population, but its numbers may not exceed thirty (thirty-six in Bohemia). In addition substitutes are elected at the same time to the number of half the members of the council, who succeed in a definite order to the membership should one or more of the members fail.

It is evident that by this method the great majority of the electors are put in the background for the benefit of those who pay heavy or medium amounts in taxes. The election is conducted according to very carefully prescribed procedure and the voting is as a rule public and oral.[2]

Any member of the commune is eligible for election who is of the male sex, is of age, and is in full enjoyment of citizen rights. Persons who are ineligible are officials of the controlling Government authority, employés of the commune, and finally those in receipt of poor relief, domestic servants, or persons who have no independent occupation, such as wage-earners and industrial helpers.

Some of the Provincial Commune Regulations make it a special proviso

[1] These are the land tax, the tax on houses and house-rents, the tax on trade, and the income tax.

[2] In the large towns, however, it is done by voting papers and secret ballot.

that certain members of the commune (or their representatives) shall belong, without election, to the elected council; such members being those who pay a certain quota (generally a fifth or a sixth) of the total amount paid in Government taxes in the commune.[1]

The communal council thus formed proceeds to appoint from among its members the headman and the commissioners or aldermen (*Gemeinderate*), who together form the executive board of the commune. The number of commissioners is not previously fixed, but may not exceed one-third of the members of the Council. All these elective offices are honorary; every eligible member of the commune who has been duly elected is bound to serve on the council or executive board unless he is exempted for a legally recognised reason.

The communal council and the executive board are both elected for three years. At the end of this period a fresh election takes place of all the communal representatives and also of the headman. A re-election of out-going members is always permitted. The commune is free to make an allowance out of its funds to the headman (or burgomaster) and, it may be, also to the commissioners. In large communes this payment to the headman is usual.

The headman of the commune, called in towns the burgomaster, is also appointed for three years.[2] His election is absolutely free: the choice is not confined to persons learned in the law, or to those who have passed an examination in administration, or who have had experience in administration, as is the case in Prussia and in most of the German states. The Austrian burgomaster is not a professional burgomaster, nor an administrative expert. According to the Austrian Constitution, in view of the principle of autonomy, any such provision would be a dangerous limitation of self-government. The idea underlying Austrian Commune Law is that the burgomaster and the headman of a commune should be the man who possesses the confidence of his fellow-citizens or of a majority of them, whatever may be his calling. The burgomasters of the Austrian towns do in fact belong to very various callings. Among them are merchants, doctors, retired judges and Government officials, private gentlemen, and so on. Naturally those citizens who have legal knowledge, and especially barristers (*Rechtsanwälte*), supply the greater proportion of the burgomasters; but only because this profession, in Austria as elsewhere, is especially compatible with regular employment in public.

The decisive influence on the formation of the representative authority in the Austrian commune is, however, exercised by the national and political opposition of parties. The part played by the legal position of the commune

[1] They are also called "single voters" (*Virilisten*).

[2] The headman and commissioners have to make a vow of fidelity and obedience to the Emperor and to the law on entering upon their office, before the representative of the Government administrative authority.

in Austria can only be understood completely through a close examination of this matter. But our limited space makes this out of the question here.

(*d*) **The Field of Activity (Wirkungskreis) of the Communes.**—The inquiry as to the field of activity of the commune—that is, as to the functions legally assigned to it in the continuity of political life—is theoretically and practically in a like degree the central problem for each communal administration. The answer given to it by positive law decides the entire constitutional and legal position of the commune. This is much more distinctly emphasised in Austrian Commune Law than in the other continental systems, for it is just at this point that the idea which inspires it—the idea of self-government by means of free communes—is felt most keenly.

The Imperial Commune Law of 1862, following the earlier plan of 1849, has distinguished two fields of activity for the commune: the independent and the deputed.

But the really important point is the description given by the law of 1862, which is still in force, of the independent field of activity. In reading Art. V. of the Commune Law, which regulates this, one learns not only that the independent field of activity includes in the abstract all those things which the commune, with its existing powers, is in a position to undertake, but also that nearly all the important branches of administration are there set forth by name in illustration of the constituent parts of the independent field of activity.[1] Thus from this point of view the Austrian

[1] Art. V. runs thus: "The independent field of activity, *i.e.* that field of activity for which, having regard to the existing Imperial and territorial laws, the commune can make provisions and arrangement according to its own free decision, includes in general everything that chiefly affects the interests of the commune and which can be managed and accomplished within its boundaries and by means of its own powers.

"To this class belong especially:

"(1) The free administration of its property and of the affairs connected with the community of the commune.

"(2) The protection of person and property.

"(3) The maintenance of communal streets, roads, squares, and bridges, the safety and facility of traffic in the streets and water-ways, and the police supervision of boundaries.

"(4) Inspection of food, and the control of the market, in particular inspection of weights and measures.

"(5) Sanitary regulations.

"(6) Regulations for domestic servants and employés and the management of the messenger service (*Dienstbotenordnung*).

"(7) The care of public morality.

"(8) The system of poor relief and the care of the communal benevolent institutions.

"(9) Police regulations concerning buildings and fires, the management of the building by-laws, and the passing of architects' plans.

"(10) The exercise of control, as legally defined, over the secondary schools (*Mittelschulen*) supported by the commune, and over the primary schools; provision for the building, maintenance, and endowment of these latter, having regard to the school patronage already existing.

"(11) The attempted settlement of disputes, by trustworthy persons chosen out of the commune.

commune appears as a Government micro-cosmos, called upon to look after not only specifically communal interests and duties, but also a number of things which are of the greatest importance to the whole community. A glance at the various portions of the independent field of activity as here enumerated shows that among the duties of the Austrian commune included in this natural or independent province are a number of administrative functions which in other continental states are strictly reserved for the central administration of the Government and its local agents. Self-government is here recognised by the Austrian Commune Law in such a way that the commune is the one competent administrative authority over the widest possible field of administrative activity: it is also, as we shall see presently, a completely free agent.

Having regard to this wide field of independent activity, it follows that the number of administrative duties specially entrusted to the commune by the Government—the so-called deputed sphere of activity—must, as a matter of course, be insignificant.

In this connection the ways and means must be considered by which in Austria the organisation is supplied that carries on these important communal activities, whether its own or those deputed to it. This organisation—the representative authority of the commune—is based entirely on the principle of representation as has been already explained. All the primary agents of the communal administration are elected from among the members of the commune. The officials and other similar assistants appointed by the commune to carry on the administration are, without exception, exclusively officers of the commune, which pays them out of its own resources. Any attempt made by the Government to influence the appointment, payment, or dismissal of the communal officials proves a complete failure in Austria. The commune thus carries on its administration in absolute freedom within the wide field of activity allotted to it by law. It supplies for itself the material means and the administrative powers which are required for this purpose. But—and this is of great importance—no force can be brought to bear upon the commune, as far as the independent field of activity is concerned, by which the Government can secure the actual accomplishment of the duties therein defined. The Austrian commune—it must be acknowledged with regret—is a completely free commune inasmuch as it is free to neglect all or a large proportion of the duties put before it in its independent field of activity.

When it is remembered that important Government duties are here in question, it is plain that this forms the great defect in the Austrian communal organisation. There is no doubt that matters of great interest to the community as a whole are left, thanks to the theoretical principle

" (12) The undertaking of voluntary sales of movable property."

Certain local police duties may, in particular communes, by reason of important consideration of state, be assigned by law to special agents of the sovereign.

of the free commune and of autonomous self-government, with, to say the least of it, a very precarious and inadequate provision. And this is yet more true since the cost of carrying out these important duties in the independent sphere of activity must be paid entirely out of the income of the commune. More will be said below as to the limits of this income.

With regard to the organisation of the communal administration for the purpose of discharging its independent and deputed functions, the law provides in principle that the communal council should be the deliberative and determining agent in all the affairs of the commune. The headman, on the other hand, and the communal committee (*Gemeinderat*) or executive board are exclusively executive authorities. To the council alone belongs in especial the preliminary drafting and the determination of the communal budget; the fixing of the general conditions for the management and use of communal institutions and undertakings; the granting of legal settlements; the making of freemen and honorary freemen; the organisation of poor relief; and finally—what is of particular importance—the fixing of general local police regulations and the legal penalties for their transgression. With regard to these last powers the commune is also bound, at least in some of the Kronlands, to compensate for damage arising through the neglect of their local police regulations, and especially to make good damages resulting from open riot. The council, in addition to this authority as a Court of first instance, is also the second and superior Court for complaints against the orders of the executive board, and in general the supervision of the board's conduct of business rests with it. It is also empowered to appoint special commissions for this latter purpose.

The council meetings are called by the headman or his deputy, by personal notice to each member, as often as is necessary, but in any case at least every quarter. As a rule the attendance of two-thirds of the members is required to form a quorum. A member of the communal council must refrain from voting if his management of public money or the private interests of himself or his relatives are in question.

The council meetings are presided over by the headman, who also possesses a casting vote. The meetings are public, but may be declared secret by a motion. Accurate minutes must be kept of the meeting, and these can be examined by any member of the commune.

The headman of the commune is the chief of the communal executive. His primary duty is to guide and supervise all business which rests with the executive board. The communal aldermen or commissioners (*Gemeinderäte*) must support him in this and must carry out the duties which he assigns to them. The headman also supervises and controls all the officials, servants, and workpeople of the commune. He can appoint and suspend these employés, but the power to dismiss them rests with the council.

The headman of the commune is its representative to outsiders; he

signs with one, or in certain cases two, of the aldermen the documents which are binding on the commune. He prepares for discussion the matters held in reserve for the council and sees that the resolutions which have been duly passed are executed. If he considers, however, that any such resolution goes outside the council's field of activity or is in itself illegal, he is bound to delay its execution and to refer the question whether it can be executed or not to the decision of the superior central Government authority.

But most especially the headman of the commune has to manage the current administration of the communal resources and property, of the expenditure and undertakings of the commune, and of the institutions used for purposes of poor relief. In all affairs of the commune which do not by law belong to the council or to the executive board, he himself takes what steps are necessary. The headman has primarily the control of the local police, and in this capacity, if the resources of the commune are insufficient, he has to summon immediate assistance from the central Government authority, as for example in cases of fire, epidemics, etc.[1]

In addition to these duties with regard to the independent field of activity the headman of the commune has also to conduct the business of the deputed field of activity in the manner prescribed by the laws. The organisation of this latter duty must, however, as a rule, be determined by resolution in the communal council, since the necessary funds are entirely provided by the commune.[2]

The function of judge in the criminal court which it falls to the lot of the headman to exercise is the most important part of the field of activity. The headman of the commune may, however, only act as judge in criminal cases in association with two communal aldermen and only when the crime in question involves the breaking of the local police by-laws, and its punishment is not within the competence of the Government Courts. As a rule he can only impose fines up to the amount of 20 krone and imprisonment for not more than forty-eight hours.

The headman of the commune is personally responsible to the Government for all the functions exercised in the deputed field of activity.

(*e*) **The Communal Budget (Gemeindehaushalt).**—The financial management of the Austrian commune falls naturally into two divisions: attention is first directed to the maintenance and administration of the capital and property of the commune, and secondly the commune must supply through taxation those needs which the returns for its lucrative property are insufficient to cover.

[1] In some of the large town communes the service of public safety [illegible] the control of the local police of the commune and entrusted to a special police corps.

[2] The Government is always at liberty to take away some or all of the business of the deputed field of activity from the headman and to conduct it through its own agents.

With regard to the possessions of the commune a distinction must be made between communal property (*Gemeindegut*) and communal capital (*Gemeindevermögen*). The first term must be understood to include all movable and immovable goods belonging to the commune, which are devoted to the common use of all persons in the commune, as for example parks, gardens, roads, and squares, wells or fountains, and various other communal institutions.[1] Communal capital is property belonging to the commune, the regular income from which is devoted to covering the expenditure of the commune.

The fundamental rule for the management of the budget is thus to maintain the communal property and capital undiminished and to administer the profit-yielding capital in such a way as to secure the highest possible income.

The financial administration of the commune is based every year upon an estimate prepared by the communal headman. This estimate must be drawn up and sanctioned by the communal council at least a month before the end of the year. Two months after the end of the year the balance-sheet for the previous year must be presented. Both estimate and balance-sheet must be published, and any member of the commune has the right to make objections, the validity of which must be considered by the communal council.

The requirements of the commune must first be met by the regular income. So far as this is insufficient the Austrian commune has the right to vote public communal taxes, which are classed together under the special name of assessments. These are of various kinds:

1. Surtaxes added to the direct Government taxes—that is, to the taxes on houses and house-rents, the land tax and the tax on trade.

2. Surtaxes added to the Government octroi in those communes where one is levied, for example in the large towns.

3. Services rendered by members of the commune to supply certain communal needs. This obviously only applies to the rural communes, where the making of roads, streets, bridges, etc., for the commune is done in this way.

4. Special communal taxes and contributions.

Surtaxes on the direct Government taxes are as a rule added equally to all the four taxes mentioned above. Government employés, soldiers, priests, and schoolmasters are legally exempted from these additional payments. The cost of new purchases and communal undertakings, and of the payment of and interest on loans made for such purposes, can only be met by surtaxes if they are voted by at least three-fourths of the electorate, who contribute at least three-fourths of the total sum paid in the commune in Government taxes.

[1] In the rural communes also, meadows into which all those attached to the commune may turn their cattle, woods which are directly for the use of the inhabitants, etc.

The surtaxes to the octroi must be so levied as to fall on the consumption of the goods affected and not on their production or sale.[1]

The commune can only make these additions to direct and indirect taxation within very narrow limits. The communal council is only authorised to vote additions to direct taxes up to 10 per cent., and to indirect up to 15 per cent., of the amounts paid to the Government. Surtaxes beyond this rate must be sanctioned by the territorial committee (*Landesausschuss*), the superior autonomous administrative authority, and in certain cases also by the Imperial Provincial Government (*Staatlicher Provinzialregierung*). Increases of over 50 per cent. must be voted by the diet, those over 80 per cent. must be approved by the Emperor.[2]

The special communal taxes have not been very much developed in Austria, for it is one of the fundamental facts of the history of finance in this country that the Government has, as far as possible, sequestrated for its own use all profitable sources of taxation. In spite of this, however, they are very various in form. In practice the most important independent communal tax is that levied independently within the communal territory on the consumption of beer, wine, and brandy, which burdens the consumers in addition to the Government and territorial taxes of the same character. The independent communal taxes include also certain taxes on luxuries, such as the tax on dogs, dance music licences, and different kinds of fees, such as market dues, taxes on civic rights, fees for the use of communal institutions, etc. The imposition of any new tax of this kind or an increase in one already existing must be authorised by a law passed in the diet.

The collection of the assessments as regards the surtaxes is made through the central taxation authority, which makes over to the commune the corresponding total amount. But a special communal tax authority may be appointed for independent communal taxes. In both cases the commune can enforce payment of taxes due to it by putting in a so-called "political" execution (*politische Exekution*), *i.e.* a direct execution through Government agents.

(*f*) **The Control of the Commune.**—The peculiar position occupied by

[1] This is expressly decreed in Art. XV. of the Imperial Commune Law.

[2] In practice, however, this right of sanction has become little but a formality. The increasing needs of the communal administration have made surtaxes amounting to 100 per cent. and more of the Government taxes a quite ordinary occurrence. The territorial committee and the diet cannot do otherwise than give their consent as a regular thing: for a permanent increase in the expenditure, and with it in the taxes of the commune, is unavoidable on account of the extent and of the importance to the whole community which characterises the commune's independent field of activity. A large part of the increased communal taxation goes towards the expenses of the primary school system, the burden of which falls almost entirely on the commune, and which has enormously developed in Austria during the last thirty years. The towns have to bear in addition the heavy burden due to the extraordinary increase in secondary schools, the greater number of which have been built and are maintained out of the communal resources.

the commune within the constitutional and administrative organisation in Austria is accompanied by a peculiar form of supervision over the communal administration. In the first place the commune, as forming the lowest autonomous territorial corporation recognised by public law, is under the control of the superior autonomous self-governing corporation—that is, the territory and its permanent agent the territorial committee.[1] But in the second place the commune must also hold a position in the whole legal organism of the Empire and of the Imperial Government. The limitations thus made necessary take the following forms :

1. The communal administration of property (*Vermögen*) and of finance is entirely under the autonomous control of the territory, *i.e.* of the territorial committee. It is the duty of the territorial committee to exercise ordinary supervision of the communal accounts and of the State of the communal property; it can also at any time make collections on the spot by means of a commission, and in case of a deficiency can supply the necessary assistance. From this it follows that in a number of matters the resolutions of the communal council are subject to the express consent of the highest territorial administrative authority. In addition to the instances already mentioned of the unification and separation of township communes and the alteration of their boundaries, a number of acts of the communal administration which affect the management of finance belong to the same category: (*a*) as noticed above, the sanctioning of higher surtaxes added to the Government taxes; (*b*) the alienation, mortgaging, or permanent burdening of property forming part of the capital or of the institutions of the commune; (*c*) the division of surpluses which may occur in any year, among the members of the commune; (*d*) the borrowing of a loan or the acceptance of a security when the amount of the loan or of the security taken together with the already existing debts exceeds the year's income of the commune.

2. The territorial committee also decides appeals against resolutions passed by the communal council concerning all affairs of the commune excepting those deputed to it by the central Government.

3. The territorial committee exercises a disciplinary control over the members of the communal executive board, can punish them for violation of duty in affairs included in the independent sphere of activity, and in case of serious violation or continued neglect of their duties it may, in agreement with the Government authority, deprive such communal agents of their office.

Even in these cases co-operation exists between the superior administrative organs of the central and of the autonomous systems. But there is also, corresponding to the double position of the commune, an independent

[1] In order to simplify the description, the modification is omitted which occurs where a district representative body (*Bezirksvertretungen*) comes between the Territory and the commune as an autonomous intermediate Court. Its province is besides essentially unimportant.

right of control exercised by the central authority over the organs of the commune in the following way:

The central administration exercises a controlling right over the commune to prevent it from exceeding its province of activity and from acting contrary to existing laws. This right of control is in fact in the hands of the political district authority[1] (*Bezirksbehörde*). In order to exercise its right of control the lowest political authority can demand that the resolutions of the communal council should be communicated to it. Besides this, the Government authority has always a right to send an official to attend the meetings of the communal council or executive board and hear what is said.

If then the communal council passes resolutions which go beyond its field of activity or are contrary to existing laws, the political district authority has the right and is bound to forbid the execution of such resolutions, from which prohibition an appeal may be made to the territorial government, *i.e.* the Lord-Lieutenancy. The political authority has the additional right, with regard to resolutions of the communal council which do not refer to matters within the independent field of activity, to decide complaints brought against orders of the executive board, if these are contrary to existing laws or are applied incorrectly. In all matters belonging to the deputed sphere of activity the appeal always goes to the political district authority, and further appeals to the central administration. The political district authority also is empowered in cases where the commune refuses to make payments and perform obligations legally due from it, to make the redress demanded at the cost and risk of the commune.

The political authority has a disciplinary penal jurisdiction over the communal headmen in so far as they may be guilty of violation of duty in the affairs of the deputed sphere of activity. Should this violation of duty be such that the Government authority believes itself unable to leave the business of the independent sphere of activity in the hands of the headman without endangering the public interests, and is therefore forced to appoint another agent to carry on this business, the commune must bear the expenses resulting from this appointment. The severest course which the central administration can adopt with regard to the commune is the exercise of the right of the territorial government (Lord-Lieutenancy) to dissolve the

[1] The following remarks will make clear the competence of the authorities of the Austrian administration of the interior. In addition to the superstructure of self-governing corporations—commune, district territory—there is another separate system of administration, *i.e.* the organisation of the Imperial local and central administration of the interior, the so-called political authorities. This also has three divisions. The lowest Court is formed by the so-called captaincy of the district (*Bezirkshauptmannschaft*), the intermediate by the Lord-Lieutenancy (*Statthalterei*), the supreme by the Ministry of the Interior. These three Courts are organised quite independently and bureaucratically, and rank one above the other, so that appeals against decisions in the lower Court pass to the intermediate Court, or territorial government, and from thence to the Ministry.

communal representative body altogether. The fresh election must, however, take place within six weeks of the dissolution. In the meantime business is carried on by a Government official sent by the central authority with the consent of the territorial committee.

All the controlling rights here described, which belong to the superior self-governing bodies on the one hand and to the central authority on the other, are exercised under the *judicial authority of the administrative Court of justice* so far as legal questions are concerned. This protects the commune from an over-wide interpretation of the rights possessed by the supervising Courts.

It would take too long to consider more closely here how far this strong administrative control is in fact actually exercised. The truth is that the political and administrative freedom of action possessed by the Austrian commune is in the long run but slightly restrained. Where there is no actual breach of the law, the interference of the Government in the sphere of autonomous administration is practically nil. The territorial control is intrinsically limited to a guardianship—which is besides not always practicable —of the communal property and policy of taxation.

III. The Special City Charters.

It has already been remarked that several special city charters or regulations for town communes were issued in consequence of the first Austrian Commune Law of 1849. These charters were those of Vienna, Prague, Brünn, Görz, and Triest. Most of the existing charters were thus issued by the territorial legislatures on the basis of the law of 1862. In more modern times the bestowal of a special charter has become rare; among the most recent are those of Trient (1888), Reichenberg (1889), and Klagenfurt (1895). Nearly all these charters have been much altered by different laws. The Territorial Law of March 24, 1900, gave Vienna a completely new communal charter and also a fresh regulation of communal elections. There are altogether thirty-three such towns having their own charters at the present time.

All these special regulations for two communes possess certain features in common, both in their relation to the central Government and in their organisation. But at the same time they show differentiation of a not unimportant kind, resulting mainly from the fact that the opinions of the Government upon the problems which arise in this connection altered considerably in some ways between the different epochs of the Austrian commune legislation—epochs which the laws of 1849, 1859, and 1862 serve to mark out.

The provision of these charters has undoubtedly helped to remedy one of the main defects in the Austrian Communal Law—that is, the fact that all communes—villages and towns, small communities and large communities alike—are in principle treated exactly the same. It is true, however, that

this remedy has only worked in an unsystematic fashion, since there are still a considerable number of the larger towns and industrial centres which are not organised in a manner corresponding to their special conditions.

The common feature which characterises all these city constitutions is the possession of an immediate relation to the territory [1] (*Landesunmittelbarkeit*)—that is, no intermediate Court intervenes between them and the Government territorial administrative authority on the one hand, or the autonomous territorial administrative authority on the other. This immediate relation is of small importance so far as concerns the latter, since district representative authorities only exist in three of the Kronlands. But it is of very great importance as far as concerns the system of Government administrative authorities centralised in the Ministry of the Interior. There the chartered towns are exempt from the administrative influence of the authority which exercises ordinary political control over the communes —that is, the captaincy of the district. Instead of this the territorial government or Lord-Lieutenancy forms the directly superior Court for the chartered towns in the respective Kronlands, so far, that is, as Government possesses the right to supervise them.

This exemption from the province of the lower Government administrative authorities has also a second and still more important result. This is that the political administrative activities which in all other communes in a district are in the hands of the district captaincy, in chartered towns are deputed directly to the commune. In this way the deputed field of activity in these Austrian town communes, in the specific sense of the term, is of much greater importance than in any of the other communes. But it is worthy of notice from the legal point of view that this special deputed field of activity within the commune is deputed to the *officers of the commune* (*Kommunalämtern*), *i.e.* to the burgomaster and his assistants, and not to the commune itself.

Since, then, in these chartered towns the commune, in principle, completely shuts out and takes the place of the lower Government administrative authorities, it follows that the entire province of Government local administration, such as falls to the share of the Austrian district authority, is deputed to it. The duties in question are in fact purely administrative, as for example the regulation of sanitation, of industry, of veterinary matters, business connected with conscription, etc., and also all the duties of an administrative magistracy in a Court of first instance.[2] The Austrian

[1] A single Austrian city is also in immediate relation to the Imperial Government (*Reichsunmittelbar*). This city is Triest, whose charter expressly declares that it is on an equality with a Kronland. In Triest the communal representative body is also the diet.

[2] In Austria the administrative magistracy is so organised that it is undertaken in the course of general administrative duties by the administrative authorities, in the divisions already described—viz. district captaincy, territorial government, Ministry. In addition to the final decision of the supreme Court, which is either the territorial government or the Ministry, there may be also a final appeal to the administrative Court.

commune—or rather the communal officers directed and organised by it, and supervised by the burgomaster whom it has freely elected—thus possesses, in these cases, such a degree of administrative authority as is enjoyed by no other continental cities.[1] This exceptional administrative possession is, however, made less agreeable to the Austrian city communes by the fact that the great expense of maintaining the necessary administrative apparatus, which in towns like Vienna and Prague may be a considerable matter, must be defrayed entirely from the communal resources or from communal taxes.

In trying to determine, by combining the features common to all these local town regulations, what might be called Austrian municipal law in a narrow sense, the first important fact to notice is that the principles and conditions of general Austrian Commune Law, as described above, also apply throughout to the chartered cities, or as they are often called the autonomous cities. Communal membership, communal territory, communal representation, communal rights of election, the administration of communal property, the sphere of activity of the commune, etc., are all in principle regulated in the chartered towns exactly as they are in the other communes. In details, it is true, there are small variations, the development and reconstitution of many of the institutions of general Commune Law; but in no case is there essential differentiation from the other communes, which are constituted according to the ordinary law. It can easily be understood, then, that the question of unification of communes is of especial importance with regard to the rapidly growing large towns; the incorporation of the suburbs in the towns is the most frequent example of this. And in the same way, what concerns the association of the community, the conception of civic rights (*Bürgerrecht*) is more important here than in small communes, on account of the numerous ancient foundations which exist. In both cases the regulations in the town charters are more ample, but in essentials exactly like those of the general law.

With regard to the sphere of activity of the chartered towns, the most important point has already been explained, *i.e.* that the deputed field of activity is here especially wide and of great importance; but it may be added with reference to this that the essential characteristic of town organisation in Austria lies in the consequent transformation of the relations between the chartered commune and the central Government.

The organisation of the communal administration shows most clearly what is peculiar to this municipal Commune Law. The fundamental idea

[1] It is true that in the majority of these towns the police system is organised as a special Government department, which carries out, in addition to its Government police duties, a number of others, apart from the functions belonging to the deputed sphere of activity, as for example the regulation of the passport system. In some towns, however, the service of public safety is organised as a Government watch committee, and this branch of local administration is then quite independent of the commune.

of autonomy, which is manifest in the general Commune Law, is certainly firmly maintained here also; but the magnitude of the duties incumbent upon the commune in this case, the large population and various other circumstances make a more elaborate organisation necessary. With regard to this there are indeed distinct differences between the various city charters; but nevertheless common features predominate.

A communal representative authority is constituted by all the charters; the size of this authority varies considerably, from 24 to 165 (Vienna) members, according to the population.[1]

According to the older organisation of the administration of municipal communes, it was prescribed that committees should be formed of the members of the communal representative body generally known as the town council (*Gemeinderat*) or town commission (*Stadtverordneten-kollegium*), often too as the communal council (*Gemeindeausschuss*). These committees prepare resolutions for the whole representative body according to the various main objects of the communal administration, and themselves dispatch the smaller business. The newer system, which is illustrated by the communal charter of Vienna, prescribes the formation of a second smaller body, chosen from amongst the directly elected representatives of the commune, and whose members, numbering about twenty or twenty-four, should receive a fixed yearly payment for their expenditure of time and energy. This smaller conversion, called in Vienna for example the *Stadtrat*, acts as preparatory agent for all matters of communal administration, and also itself manages a quantity of the less important business.[2]

[1] The Imperial capital, Vienna, is divided at present into twenty-one districts, within which those entitled to vote are formed into four electoral bodies; the first three of these have each to elect forty-eight members of the town council (*Gemeinderat*), while the fourth elects twenty-one. The voting takes place according to districts. In the first three electoral bodies, the mandates are divided according to the relation which the number of voters in the single district bears to the total number of voters in the similar electoral body in all districts. In the fourth electoral body each district elects one councillor. The first three electoral bodies consist of the taxpayers; the division of the total sum paid in taxes between the three bodies is not indeed arranged after so plutocratic a fashion as in the general Commune Regulation, but it still gives an advantage to the propertied middle classes. In the fourth electoral body, vote all adult male Austrian citizens who have resided in Vienna for three continuous years. The present Regulation of Elections Order (*Wahlordnung*) in Vienna bears a quite definite political character, which can only be fully explained by means of the whole communal history of the town during the last two decades. The main point is that the lower middle class and the mass of lower officials, the small tradesmen and artisans (a very numerous class in Vienna) and a part of their workmen, have possessed political power during the last ten years, and have therefore developed the franchise system, in a democratic sense it is true, but also with a view to maintain their influence.

[2] The *Stadtrat* in Vienna has at present legally twenty-seven members. It is the absolute authority in the commune on all matters belonging to the independent field of activity which are not reserved for the town council or handed over to special committees or to the magistracy. It appoints all officials and employees of the commune

Besides these two bodies, the conduct of communal administration lies above all in the hands of a burgomaster and of his deputy or deputies. The burgomaster is freely elected in these town communes as well as in others, but in these cases the choice must receive the express sanction of the Emperor. Here, as elsewhere, there is no tendency towards "professional" burgomasters. Any elected town councillor, whatever his rank and calling, is eligible for election as burgomaster or deputy burgomaster.

Under the control of the burgomaster and his deputies works the whole official system of the commune, which, under the title of the "magistracy" (*Magistrat*), is organised as an important authority, having at its head a director (*Magistratsdirektor*) learned in the law, and his deputy, who also of necessity possesses legal knowledge. In places where there are large communal undertakings, such as municipal gas and electricity works, tramways, etc., these are organised independently as technical and administrative industries, but their managing authority serves to connect them with the organism of the "magistracy" as a whole.

The magistracy itself is divided into a number of official departments, each concerned with one or more of the main branches of interior administration, such as the departments of industry, poor relief, sanitation, etc. At the head of each department is a councillor (*Rat*) or other high official of the "magistracy," who must have legal knowledge and must also have passed the Government examination in administration. In addition there are a number of expert officials, engineers, doctors, sanitary officials, and also a special body of accountants and cashiers.[1]

All the communal officials are without exception appointed, paid, and dismissed by the commune. They are entirely under the control of the burgomaster, and the central administration of the Government does not interfere with them in any way. The commune itself determines the conditions of appointment, service, and pension, and in general the privileges of the employés.

at the suggestion of the magistracy, and nominates teachers in the communal schools for the confirmation of the school authorities. It is empowered to sanction expenditure not mentioned in the budget up to 20,000 krone without the confirmation of the town council, and in case of extreme urgency it may exceed this amount, for which action a subsequent indemnity must be obtained. In Vienna there exists in addition a specially decentralised form of communal administration in the shape of the so-called district representative body (*Bezirksvertretungen*). One of these is organised in each district, and forms an authority elected by the communal electorate, which chooses its own leader, the headman of the district (*Bezirksvorsteher*). The field of activity of the district representative body is confined to such matters as may be deputed to it by the town council, either permanently or from time to time. It acts mainly as an advisory body as representing the special interests of the district, and is particularly important in matters of poor-law administration, the regulation of streets, the guardianship of communal property in the districts, street cleaning, and so on.

[1] In Vienna the "magistracy" consists of roughly 1,850 in definite employment, whose salaries range from 1,600 krone to 12,000 krone. All communal officials are eligible for pensions.

The whole of the communal administration—and this applies in particular also to the new communal charter for Vienna—is completely under the control of the burgomaster, and he is personally responsible for it. The responsibility is two-fold. On the one hand it exists—not indeed *de jure*, but *de facto*—towards the majority of town councillors (*Gemeinderäte*) by whom he was elected burgomaster. The loss of the confidence of this majority in the burgomaster, if not a legal ground for his retirement, does in practice as a rule cause it. On the other hand, the burgomaster is legally responsible to the territorial government, to which he is answerable for the legal conduct of the administration of the whole sphere of deputed activities.

It is quite impossible to describe, in this place, the thirty-three city charters so as to show how the fundamental principles of Commune Law are put into practice in almost every town with smaller or larger variations. Neither is there space to explain the political form of the communal organisation in the large Austrian town communes, and thence to show how these remarkable productions took root and developed in ancient bureaucratic Austria, as communal administrations almost entirely free from Government administrative authority. There is only space for a glance at the Prussian City Regulations in order to see the wide difference which exists between the Austrian and the Prussian municipal systems. There—in Prussia—the elected communal representative body has in fact a decisive influence only as regards the budget and the administration of property. The real control of the current administration of the commune, and also almost the entire initiative in communal politics, is in the hands of a professional burgomaster—who is generally elected from among the Government employés and transferred to the service of the commune—and of the magistracy under him. The burgomaster is, as the head of the magistracy, responsible to the central Government, and indeed stands in a not very different position with regard to it than any other Prussian official chief to the officials of the office over which he presides. The agreement of this magistracy—whose character of Government office is not at all altered by the unpaid members attached to it, and who are elected by the communal representative body as honorary officials—is required to every resolution of the communal representative body before it can be executed. In Prussian towns also the entire executive of the town administration rests with the magistracy and the burgomaster, as well as the representation of the town to the outside world. Besides this the Prussian burgomaster has a right of censure and suspension in respect of the resolutions of the magistracy, which he is bound to exercise "in the interests of the commune and of national prosperity." The burgomaster, the members of the magistracy, and all other communal officials are, according to Prussian law, "direct" (*unmittelbar*) Government officials, who are under the disciplinary control of the Government and can be dismissed by it for disciplinary reasons.

Throughout, in the most various forms, the guardian hand of the

Government and of the bureaucratic central administration presses heavily upon the communal administration in Prussia, so that self-government often remains a mere form. Austrian law and Austrian practice both in large and in small communes show a very different picture! Here, under the influence of peculiar historical conditions and strong political force, the commune has in reality become a well-established independent body over against the Government, to which the latter has permanently entrusted a large portion of its own administrative duties, only reserving to itself such control as is necessary to protect existing rights and to maintain the law. Here the commune has actually become a free administrative corporation, independent, that is, of the Government and its centralised bureaucracy.

It is another question, however, whether this system of communal administration in Austria has justified itself, or whether the disadvantages which result from it do not outweigh the advantages of the political liberty which finds its expression therein. The answer to this question would be nothing more nor less than a careful criticism of the whole Austrian communal administration, which is neither desirable nor possible here. This much may, however, be said: this system of communal self-government in Austria, which has now existed and has been developing for half a century, has grown up so closely with the whole constitution, with the political life, with the very habits of the Austrian nation, that however much reform in details should be striven for, it is out of the question to suppose a disappearance of or serious modification in the fundamental principle of free communal administration—corporate and representative in character—in this country.

MODERN OTTOMAN LAW.[1]

[*Contributed by* Sir Roland K. Wilson, Bart.]

The learned editor is to be heartily congratulated on the completion of this very valuable work. The fear expressed in our review of the first three volumes, that his removal to Madrid might compel him to leave it in other hands, has happily not been realised. It has, as he acknowledges in one place, prevented him from doing as much as he could have done at Constantinople in the way of annotating and revising the French translations of the Codes; but on the other hand the delay has enabled him to present in a completely codified shape the important topic of Mines Regulation, which at the date of the appearance of his first Part was represented only by fragmentary enactments of various dates. [See vol. vi. p. 16, note.]

He must have been greatly encouraged to proceed with his task by the high appreciation of its value shown by the Ottoman Government itself, the Sultan having conferred on him in the interval the gold medal of the Liakat, an order instituted for the recognition of enterprises which are of public utility to the Empire.

To most readers of this journal the volumes of greatest interest will be the sixth and seventh, which contain the Land Code and the Civil Code, the Penal Code, and the Codes of Civil and Criminal Procedure. These codes are also, as the editor observes, less likely to require early revision than the enactments dealing with home and foreign trade and finance, and will on that account better repay careful study. Modern Turkish legislation falls roughly into two classes: the codes genuinely intended for home consumption, and those of which the primary aim is to satisfy the foreigner, and to support the claim of Turkey to equal international treatment. We may place in the former category, among others, the Land Code, the Civil Code, and (perhaps) the Penal Code; and it is these three alone that we propose to examine in detail.

The Land Code.—We noticed in our review of the earlier volumes the peculiar arrangement by which *droit de propriété immobilière* was concisely dealt with in vol. i., immediately after *droit successoral*, but was reserved for

[1] *Recueil des Codes, Lois, Règlements, Ordonnances et Actes les plus importants du Droit Intérieur, et d'Études sur le Droit Coutumier de l'Empire Ottoman.* Ouvrage honoré de la médaille d'or du Liakat. Par George Young, M.V.O., 2me Secrétaire de l'Ambassade d'Angleterre. Vols. iv.–vii. (Oxford: Clarendon Press, 1906.)

fuller treatment, under the synonym *droit foncier*, in vol. vi. Here we have a regular code of 132 sections, dating from 1868, and variously designated "Code des Terres," "Code de Propriété Foncière," and "Code Rural"; which however by no means exhausts the subject. It is preceded by a Forest Law of 1880, and by the above-mentioned Mines Law of 1906, and it is followed by a variety of enactments dealing with cognate topics. Asiatic Turkey resembles British India in being predominantly agricultural; and there is also the common feature of absolute ownership (*mulk*) being the exception, and some sort of conditionally permanent and transferable tenure, under the State as supreme landlord, being the rule. The lands which are not "mulk" are classified as "miri" (State domain); "mevcoufé," *i.e.* subject to "vacouf" (*wakf*), or mortmain; "metrouké," *i.e.* subject to common or public rights; and lastly "mevat" ("dead"), *i.e.* untilled land far from human habitation, to which any squatter may acquire a title by bringing it under cultivation. It is said that the "mevcoufé" lands alone constitute more than three-fourths of the land built over or cultivated within the Empire; and this has been sometimes pointed to as one of the chief sources of industrial stagnation and of financial difficulty to the Government. Comparison naturally suggests itself with the state of England before the dissolution of the monasteries; but the "dedicated" lands of Turkey do not support celibate communities of monks and nuns, nor are they exclusively devoted to religious or even to charitable uses in our sense of those terms. The "pious foundation" may be, and often is, employed, like our own entails and settlements, for the preservation and aggrandisement of the founder's own family. It is an open question whether the system is more or less adverse to economic progress on that account. It is also an open question whether it may not be sometimes beneficial in both forms, as a safeguard against economic retrogression, where the government is so bad that the subject has more to suffer from its rapacity than to gain from its ability to protect him. It goes without saying, however that no government will see the matter in this light, and thus we might expect to find, and do find, the financial advisers of the Sultan chafing against an institution that hampered both public and private borrowing, and going as far in the direction of loosening the fetters as public opinion would permit. It is in fact only from this point of view that "wakf" comes within the scheme of the present compilation, which does not profess to deal with matters reserved to the exclusive jurisdiction of the religious tribunals, but only with the civil legislation of the Ottoman Empire.

The present department of the "Evkaf" (plural of "wakf") dates from 1840, such supervision as was previously exercised over pious foundations having been entrusted to the "chief of the black eunuchs." The head of the department is a Cabinet Minister, and his staff are paid out of the "wakf" revenues. In 1867 a Commission was appointed to consider the possibility of totally suppressing the system; but "the influence of civil legislation, even at this its high-water mark, was not strong enough to rescue from

the grasp of the Cheriat so vast and opulent a domain." Certain restrictions were however imposed, not on "wakfs" properly so called, *i.e.* where a person dedicates property held by him in full ownership, but on the quasi-wakfs constituted by dedication of "miri" lands (*v. inf.*) to some specified purpose by, or with the permission of, the State. These are now made in some cases attachable for debts due from the deceased possessor to the Treasury or to private creditors.

The tenure of "miri" land which is not "mevcoufé" is compared by the editor to the *ager vectigalis* of Roman law, better known under its later name, common to public and private grants, of *emphyteusis*. The State reserves to itself the *dominium*, or paramount ownership, while the lessee, or "possessor by *tapou*," has the undisturbed and exclusive control of the land during his life, subject to certain statutory conditions; as that he must not allow it to go out of cultivation, must not radically alter the kind of cultivation without permission of the authorities (*e.g.* by turning arable land into vineyards), must not erect new buildings, nor consume the substance of the soil by brickmaking, etc., without the like permission. He may transfer his interest with the sanction of the State (represented for this purpose by some sort of district council) and on payment of a registration fee of 3 per cent. on the sale price or on the ancient valuation, whichever is the higher; the reasons, if any, for which this sanction may be refused are not stated. The last general survey and valuation of domanial lands is said to date from 1602. On the death of the possessor of "miri" or "mevcoufé" land, it passes as a matter of course, without fine or other formality, to his descendants, or to his parents, or to his brothers and sisters, as the case may be (together with the surviving spouse, if any), according to a scheme of inheritance differing widely from the general Islamic law. Failing any of these near relatives, the option of acquiring the tenant-right by payment of "tapou"—*i.e.* the price fixed by impartial valuers—passes successively (1) to the absolute owners of any trees growing, or buildings erected, on the land in question; (2) to persons associated in interest with the deceased (*associés ou cointéressés*); or (3) where the holding is of moderate extent, to all the inhabitants of the locality in question. Failing all of these, the "miri" right is put up to auction. Under these regulations certain privileges are accorded to soldiers of the regular army; thus once more recalling a well-known feature of the Roman law.

The Civil Code.—The spirit and aim of the Code Civil Ottoman may be gathered from the Report of the Law Commissioners who drafted it, which the editor has done well to set out in full, and from which the following passages are extracted:

> That part of sacred knowledge which has reference to mundane affairs is divided into three categories: (1) that which treats of marriage, (2) that which regulates transactions in general, and lastly (3) that which has for its subject the

penal laws. *The legislation of all civilised nations reproduces this threefold classification, the division which regulates transactions in general taking the name of the Civil Code.*

The assertion here italicised is certainly an amazing one to proceed from a body of lawyers who must have been familiar with the French Civil Code at all events, if not with any other. For the Code Napoléon, so far from treating marriage as one of the three primary divisions of the entire Corpus Juris, devotes to it only one of eleven titles in Book I., where it is treated as a status, and one of seventeen titles in Book III., where it is treated as a contract giving rise to proprietary rights. Yet from the Mussulman point of view there is more authority, and also more reason, for the arrangement than appears at first sight. It is a fact that some of the old Muhammadan jurists do divide *contracts* into two categories, marriage being one and all other contracts making up the other. And in the Preliminary Title of this code, the religious principle underlying the classification is explained substantially as follows: The precepts of the Sacred Law relate partly to the future and partly to this present life. So far as the latter is concerned, two leading divine purposes are clearly discernible: the perpetuation of the human species by continued reproduction until the Day of Judgment, and the preservation of the individual for his allotted span of life. The first depends on the union of sexes, the second on industrial co-operation and exchange of services, since man is incapable of providing for his own subsistence by isolated effort. Consequently the two principal matters requiring regulation are (1) the union of the sexes, and (2) business transactions between man and man. The necessity for enforcing by penalties whatever regulations are required accounts for the third branch. If we take marriage as drawing with it all family relations, including tutelage and succession, this is not an illogical division; and it does so happen that it corresponds pretty closely with the line actually drawn at the present time, both in India and in Turkey, between the matters regulated by general codes applicable to all persons alike, without distinction of race or creed, and those reserved for special treatment according to uncodified usages purporting to be based on the Scriptures of the particular religion professed by the parties. But just as those Anglo-Indian codes that are meant for general application reproduce in the main the spirit of the national laws of the dominant race, though in a greatly simplified form and with some slight adaptation of the substance to Indian requirements, so the Ottoman Civil Code, drafted and enacted by Moslems, but meant to regulate the ordinary business transactions, outside the family circle, of all Ottoman subjects, professes uncompromisingly to draw its inspiration from the theocratic law-sources of the dominant religion, while approximating in its form to the modern European pattern, and to some extent modernised in substance under pretext of selection and compression.

To proceed with the Report of the Commissioners: after explaining how

the modern extension of commerce has necessitated a separate commercial code to regulate forms of business unknown to the ancient jurists of Islam, out of which transactions, however, questions are constantly arising of which the solution has to be sought in the general law of Islam, and therefore from the religious tribunals; how again the Imperial enactments promulgated at different periods deal in a disconnected way with isolated points in the civil law, and require to be supplemented by the aforesaid general law; how thereupon difficulties arose owing to the Sacred Law being administered by one set of tribunals and the laws of Imperial enactment by another set, and how they were driven to seek a solution thereof in the framing of a code (to be administered by the ordinary Nizamié tribunals) which should incorporate and harmonise the two kinds of law, they go on to observe:

> The sacred jurisprudence resembles a vast ocean, at the bottom of which must be sought, at the cost of immense exertions, the pearls therein concealed. One must combine wide experience with vast erudition in order to be able to extract from the Sacred Law suitable solutions of all the questions that arise.

Then follow illustrations of the necessity for taking into account changes in social habits when applying ancient rulings to new cases; and then, after alluding to various attempts in former days to bring order out of chaos, we have the frank admission that—

> At the present day, competent expositors of the Sacred Law are becoming more and more rare, so that it is difficult to find, not only members of the Nizamié tribunals capable of resorting on occasion to that source for a solution of their doubt, but even a sufficient number of cadis to supply the Chéri tribunals throughout the Empire. Hence the need had long been felt for a work treating of transactions in general on the basis of the Sacred Law, containing only the least disputed and least disputable opinions, and drafted in a style sufficiently simple for every one to study it with ease and to conform his actions thereto. Such a work is obviously of immense utility, not only for the judges of the Chéri, but also for the members of the Nizamié tribunals and for administrative officers. . . . In drafting the present code we have never gone outside the range of Hanefite jurisprudence, and the rules that we have inserted therein are for the most part actually applied in the "Fetwa-Hané." Nevertheless, seeing that among the opinions of the most authoritative jurists of that school some are less rigorous and better suited to modern requirements than others, it is these that we have adopted. [Here follow examples.] . . . In controverted questions one is bound to act conformably to the opinion sanctioned by the Commander of the Faithful. Consequently, should your Majesty approve the work hereby submitted to you, we pray that you will be pleased to take the necessary steps for clothing it with the Imperial sanction.

Thus the Commissioners claim in effect for their code a purely Mussulman character, and this claim is on the whole borne out by its arrangement and contents, though the French dress in which it is here presented, and the

frequent references to parallel (or contrary) texts of the Code Napoléon which the editor has supplied, rather prepare one to expect the contrary.

After the exordium above quoted concerning the threefold division of the Divine Law governing mundane affairs, we have a set of "fundamental principles," or general maxims, such as that agreement should be construed according to the intention of the parties, that *cessante ratione cessat lex*, that the accessory follows the principal, and so forth. Then we are plunged at once into the subject of contract, commencing with sale (so defined as to include barter), and proceeding next, as in the French code, to letting and hiring (*louage*) of lands and houses, goods and services. Here the coincidence with the French order of topics begins and ends. As regards the contracts themselves there is naturally a large amount of common ground, but there are some significant exceptions, both in the way of omission and of addition. Thus in the French code we pass naturally from loan for use (*commodatum*) to loan for consumption, or loan simply (*mutuum*), and thence to loan of money at interest. The Ottoman code has a title concerning loan for use, under the general title of "things entrusted to another person" (*emanet*), but nowhere anything about *mutuum*. The reason probably is that loans of money at interest are forbidden by the Sacred Law, while loans without interest are regarded as gifts made in expectation of a return (Art. 855). For a similar reason, not merely actual wages, but the whole class of aleatory contracts, including the purchase of annuities and the various forms of insurance (Book VI. Title 12 of the Code Napoléon), find no place in the Ottoman Civil Code. On the other hand, the transaction called "havale" (*hawalat*), in which a debtor transfers his liability to another with the assent of the creditor, has no distinctive name in French or English law, because it is supplanted in practice by suretyship. In the French Civil Code, § 1271 (2), it merely receives passing mention as one of the three possible forms of "novation"; but it occupies a prominent place in the old Muhammadan law-books (see Book XIX. of the Hedaya), and has a Book all to itself, though a brief one, in this code. Again, there is a species of partnership called "moudarébé" (*mozarabat*), in which one partner undertakes to provide capital and the other skill and industry, for which neither French nor English Law has any specific name, and the importance of which in Muhammadan law is an indirect effect of the prohibition of usury. In modern European business the possessor of capital either spends it in paying wages for the labour and skill that he requires for business of his own, taking all the profits for himself, or else lends it at a fixed rate of interest to persons requiring it for some undertaking which they propose to carry on at their own risk and for their own profit, or, thirdly, buys shares with it in a limited company. The first method is provided for in this code under the head of "Louage"; the second is barred to the conscientious follower of Mahomet; the third had not yet received statutory recognition at the time when this code was

completed, but is now regulated by an Imperial enactment of 1882, which will be found at p. 55 of vol. iv. of this collection, under the title "Sociétés anonymes ottomanes." Another transaction which has indeed a specific name in the French code, but which has a far greater vogue and importance in Turkey and India, owing to its convenience as a device for evading the prohibition of usury, is the "vente à réméré" (*béi bil wafa*), that is, a sale with the option of redemption.

The bulk of Book I. of the Code Napoléon ("*Des Personnes*") has no counterpart in the Ottoman Code, the matters treated therein being for the most part reserved to the Chéri tribunals; but there is one interesting exception. Title 11 of that book, dealing with "Majority, interdiction, and the family council," shows a remarkable correspondence, not in the least due to imitation, with the first title in Book IX. of the Ottoman Code, on a point in which the English law differs from both—namely, that besides the usual disabilities of minors and lunatics the "prodigal" of whatever age, without any proof of unsoundness of mind other than the fact of reckless prodigality or folly in business transactions, may be placed under judicial control as regards the management of his property. There is, however, this difference, that whereas in France this control is delegated to a family council, under this code it is to be exercised by the judge himself.

If the code is restricted, on one side, by the exclusion of such important subjects as marriage, successions, and testaments, it is unduly extended on another side by an encroachment on the domain of adjective law, the last three books dealing respectively with actions, evidence, and the qualifications and duties of a judge. This may be simply because the medieval text-books know nothing of the distinction between substantive law and procedure; in the Hedaya, for instance, "Duties of the Kazee" and "Evidence" are sandwiched between "Transfer of Debts" and "Evidence." But it may be also connected with the fact that at the time when this Code was in preparation the proposal for a separate Code of Civil Procedure had been dropped. It was revived and brought to completion in 1880, but the procedural portion of this code does not appear to be superseded by the new code, which expressly refers to certain clauses thereof as still subsisting. Thus the law governing the procedure of the ordinary civil tribunals is at the present time drawn partly from French and partly from Islamic sources.

In point of style, the Ottoman Civil Code is quite refreshingly readable, owing to the liberal use of illustrations and the absence of any painful straining after precision. Take, for instance, Art. 443. "When a fact supervenes which interferes with the realisation of the object of the hiring, the contract is *ipso facto* dissolved. Such is, for example, the case when a cook is engaged for a nuptial feast, and the bride or bridegroom happens to die; and it is the same when, after a person has come to terms with a dentist as to the fee to be paid for extraction of a tooth, the toothache

disappears. Similarly, an engagement with a wet-nurse is not dissolved by the death of the employer, but it is put an end to by the death of either the nurse or the nursling."

So in Art. 902 the principle of accession is illustrated by a person letting fall a pearl worth five hundred piastres, which is swallowed by a hen, worth five piastres. The owner of the pearl can take the fowl with its precious content on tendering five piastres to its owner.

Art. 915 is a curious ruling on contributory negligence. "He who tears the coat of another in pulling it off is liable for its entire value. But if he merely takes hold of the garment, and the owner tears it in wrenching himself away, he is only liable for half its value. And similarly if a person sits down on the tail of another person's coat, and the latter, being unaware of the fact, gets up suddenly and tears it, the former is only liable for half its value."

Here, reversing the usual practice of modern code-makers, instead of the bare rule being given without examples, the examples are given without the rule supposed to be illustrated. From a strictly scientific point of view, assuming that the primary aim of a code is to minimise the possibilities of dispute among trained lawyers, this loose, easy-going style, rather suggestive of a professional lecture, is certainly open to criticism; but from the point of view of practical statesmanship under the given conditions it may be regarded as a merit. The problem of immediate urgency was to rescue the administration of justice between Ottoman subjects, Mussulman and non-Mussulman alike, in respect of ordinary civil transactions, from degrading dependence on a dwindling circle of medievalist bookworms, without disturbing the general belief of the devout that the fundamental principles of the dominant religion were being duly maintained. This task, so far as the foreign reader can judge, seems to have been performed with no small skill; as to the actual working of this and other laws, it is no part of the editor's plan to enlighten us.

The Ottoman Penal Code.—This code is of earlier date than the Civil Code, having been originally promulgated in 1858, and republished with modifications in 1863, thus synchronising very nearly with our own Indian Penal Code, passed in 1860, to come into force in 1862. In point of form it is modelled very closely on the French Penal Code, which however is nearly twice as long. The topics treated in both codes are taken in nearly the same order, though differently subdivided, and many sections are copied almost verbatim. The differences of substance are, however, considerable; the following may be specially noted:

The list of punishments begins in both codes with death, but whereas the French code specifies the mode of execution, the Turkish does not; the fact being that impalement or crucifixion, which is prescribed definitely by the Sacred Law for certain offences (as stoning is for others), would not look well in a code exposed to European criticism.

The public exposure of convicts before undergoing their sentence of forced labour or imprisonment, expunged from the French Penal Code in 1848, is retained in this code; the Mussulman *uléma*, and priests of every religion, being exempted. On the other hand the exceptional public degradation provided by Art. 13 of the French code for the "parricide," who is to be taken to the place of execution in his shirt and barefooted, his head covered with a black veil, finds no place in this code. There is nothing corresponding to the French provisions against vagrancy and mendicity.

The French section dealing with bigamy has no Turkish counterpart; and where the French code makes it an offence, punishable with fine, on complaint of the wife, for a husband to introduce a concubine into the conjugal abode, the corresponding section of the Ottoman code applies only to "commerce adultérin," which probably means, as read with the Koran, connection with a woman who is neither lawfully owned as a slave nor one of the four permitted wives. On the other hand, the extent to which provisions borrowed from France are allowed to over-ride well-known rules of the Chéri, and even the very text of the Koran, is very remarkable. The adulteress and her paramour are punishable with from three months' to two years' imprisonment instead of death, the offence being provable in the ordinary way, instead of the almost impossible proof required by the Koran. The right of the husband to kill both the guilty parties if caught in the act, which was recognised at one time by the Courts of the East India Company in deference to the opinion of their Muhammadan law-officers, is whittled down, in accordance with French law (and possibly with some Muhammadan authority), to a mere extenuating circumstance. The thief is sent to prison instead of having his left hand cut off, and for anything that appears in this code the famous bastinado plays no part whatever in Turkish justice. Not only is there no mention of the Koranic eighty stripes for wine-drinking, but there is not even any penalty for actual drunkenness. Nor (to pass from the smallest matters to the greatest) is apostasy from the Muhammadan religion punishable capitally or otherwise under this code.

Are all these concessions real? or do the Chéri tribunals still retain some sort of criminal jurisdiction over Moslems, independently of the codes? The matters enumerated in the departmental circular of 1887, quoted by Mr. Young at p. 291 of vol. i., and noticed in our former review, do not include any direct infliction of punishment in the name of the State, though they do include claims by the relatives of the slain or wounded person to retaliation or the price of blood; which rights are expressly reserved by the first article of this code. If this enumeration is exhaustive and authoritative, it must be allowed that the greatest of Muhammadan governments is capable on occasion of taking very surprising liberties with even the best-attested injunctions of the Prophet.

In this as in our former review we have been compelled by con-

siderations of space to limit our survey of the great compilation before us to a few selected portions, and the selection may appear to some readers rather arbitrary; but the guiding principle was to select for detailed examination what seemed likely to afford most instruction to the student of comparative jurisprudence.

Of the editor's work as a whole we can only repeat what we said of the portion first published: that it has been admirably done within the limits imposed on him by circumstances. The historical and explanatory introductions prefixed to some (not all) of the enactments collected are excellent so far as they go, though one might wish that they had been more numerous and fuller, and the same may be said of the footnotes; but the question of bulk and price had of course to be considered. The index is well arranged and sufficiently copious, though we cannot say that all the references we happened to test have turned out to be correct, *e.g.* the first reference under *aveu* (acknowledgment) proved to be a mistake for *aval* (indorsement). Misprints are not quite so rare as is usual with books emanating from the Clarendon Press; and it would have been a convenience to the unlearned reader to have the date A.D. given in addition to that of the Muhammadan calendar, invariably instead of intermittently. But these are very trifling blemishes in a great and useful achievement.

THE GREAT JURISTS OF THE WORLD.

VI. THOMAS HOBBES.

[*Contributed by* J. E. G. DE MONTMORENCY, ESQ.]

THOMAS HOBBES was born in 1588, the second son of the Vicar of Charlton and Westport in Wiltshire. He was sent to school at Westport Church at the age of four, and "at the age of six was learning Latin and Greek." This stern beginning was not relaxed, and early in 1602-3 the boy was entered at Magdalen Hall, Oxford. To some extent certainly he was influenced by the Puritanism of his college, and we know that he was repelled by the mediæval scholasticism that still permeated the atmosphere of Oxford. He took his bachelor's degree at the end of 1607 and became the tutor and friend of William Cavendish, afterwards second Earl of Devonshire. For twenty years he remained with his patron, and in 1631 he became tutor to the eldest son of his first pupil. This involved a further foreign tour, from which he returned in 1637. In the course of his long continental journeys he had become acquainted with many of the thinkers of that age, including Galileo and Descartes. At some time he was on intimate terms with Francis Bacon, though at what date before 1626 is not clear. "Hobbes," says Mr. Leslie Stephen, "according to Aubrey, wrote from Bacon's dictation, showing, as may be believed, more intelligence than other amanuenses, and helped in turning some of the essays into Latin. Hobbes, however, makes very slight reference to Bacon, and does not seem to have been directly influenced by his philosophy."[1] It is, however, most probable that his legal ideas were affected by the views of the great Chancellor, and it may be possible to trace some juridical unity of thought.

Social Philosophy.—It was not until after 1637 that Hobbes began to produce in systematic fashion his scheme of philosophy, though he had for some years been gradually developing his philosophic position. In 1640 he completed his treatise on *The Elements of Law, Natural and Politique*, published some ten years later in two parts, "Human Nature, or The Fundamental Elements of Policy," and "*De Corpore Politico*, or Elements of Law, Moral and Politic." In 1641 he finished his treatise *De Cive* containing his theories on politics and religion. This was published in 1642 and again in 1647, and an English version was issued some years later. Meantime Hobbes

[1] He certainly inherited Bacon's contempt for Coke.

was out of England. He had fled in November 1640 from what seemed to be the wrath to come and settled in Paris. Here he remained eleven years and here he composed his immortal work the *Leviathan*. This was sent to London for publication and appeared in 1651. Hobbes was accused of supporting in this work Cromwell and the results of the Great Revolution, but of this charge he is wholly free.[1] It is true that he compounded with the Republic in 1651, but so did far more eminent cavaliers. In 1655 he was at last able to publish his preliminary philosophical work the *De Corpore*, a volume "containing his first principles, as well as his mathematical and physical doctrines." The complete volume, *De Homine*, on psychology, never appeared, though a work with that title of little original value appeared in 1658. At this time Hobbes was largely wasting his time in fruitless, and indeed disastrous, conflicts with the Royal Society group of thinkers. He was not a mathematician, and in his former conflicts with Descartes had been as little successful as he was between 1660 and 1666 in his ridiculous battles with John Wallis, the Savilian professor of geometry. He lived on, working to the last, under the protection of the Cavendish family until his death on December 4, 1679, in his ninety-second year. In his later period his fame had increased and he was both idolised and attacked at home and abroad. To certain classes Hobbism became a species of sin, and as late as 1734 "he was reviled on all sides as the typical atheist, materialist, political absolutist, and preacher of ethical selfishness." But his acuteness and his pungency of mind and the brilliancy of his philosophic thought could no longer be in doubt when the peculiar bitterness aroused by his controversial manner and the novelty of his attack had died away. He set England thinking.

Hobbes [says Mr. Stephen in his valuable biographical notice[2] already referred to] produced a fermentation in English thought not surpassed until the advent of Darwinism. . . . Hobbes was in truth a product of the great intellectual movement distinguished by such names as Bacon (1561—1629), Galileo (1564—1642), Kepler (1571—1630), Harvey (1578—1657), and Descartes (1596—1650). . . . He shared in the general repudiation of scholasticism. In his so-called "Philosophia Prima" he touched hastily upon first principles, but failed to recognise the significance of the ultimate problems the answer to which by Descartes founded modern philosophy. His thorough-going nominalism is his most remarkable characteristic. At the same time he was scarcely influenced by Bacon's theory of the importance of systematic induction and experiment. He conceived of a general scientific scheme of universal knowledge, deducible by geometrical methods from the motions of matter which he assumed to be the ultimate fact. The conception recalls in some respects that of Mr. Herbert Spencer. . . . His great achievement, however, is his political philosophy, especially as given in the "Leviathan." It was the edifice under which he endeavoured afterwards to introduce the foundation of philosophy, doubtless congenial, but not the real groundwork of his doctrine. Like all the great thinkers of his time, he had been profoundly impressed by the evils caused by the sectarian animosities of the time. His remedy was the entire subordination of the ecclesiastical to the

[1] There is evidence enough of this in *The Dialogue of the Common Laws*.

[2] *Dictionar* *National Biography*, vol. xxvii.

secular authority—a theory which made the religion of a state dependent upon its secular sovereign, and therefore not derivable either from churches or philosophers, and shocked equally the rationalists and the orthodox. . . . In support of his absolutism he interprets the doctrine of the social contract (which had been recently expounded by Hooker and Grotius) not as a compact between the sovereign and his subjects, but as between the subjects to obey the sovereign. Virtually he argues that states have been formed as the only alternative to the state of nature, or, on his showing, to anarchy and barbarism. The supremacy and unity of the sovereign power is therefore an expression of the essential condition of civilised life. To this, though with some reserves, he subordinates even the moral law; and his characteristic theory of human selfishness reduces the only sanction to fear of force or each man's hopes of personal advantage.

This last statement is somewhat misleading, as Hobbes includes under the idea of force the control exercised by the Supreme Being, and reduces all authority to a Divine source.

The Laws of Nature.—The laws of nature according to Hobbes are precepts or general rules "found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be preserved." This is not, he tells us, to be confused with "the right of nature" (*jus naturale*) which is "the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently of doing anything, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto."[1] These laws and rights are not to be confused with the laws and rights arising therefrom which have what I may call a municipal origin. Hobbes forestalled Austin in defining law as "the command of him or them that have coercive power."[2] It is in reference to law so defined that we are told that "The desires, and other passions of man, are in themselves no sin. No more are the actions, that proceed from those passions, till they know a law that forbids them: which till laws be made they cannot know, nor can any law be made, till they have agreed upon the person that shall make it."[3] In this passage Hobbes seems to take from his own conception of natural law and natural rights all sanction, but he probably, or indeed certainly, does not intend this. His doctrine of an original or primeval "state of war" among men no doubt implies an irresponsible sinlessness before the advent of municipal authority. Moreover, since the laws of nature are "found out by reason," Hobbes probably assumed that these laws were still *in nubibus* during the period of primeval human chaos. Unwitting neglect of the laws of nature may be taken, as a result of the consequences of neglect, to have led to their instinctive appreciation and their ultimate formulation. This becomes

[1] *Leviathan*, Part I. cap. xiv.

[2] *Computation or Logic*, cap. vi. (Sir William Molesworth's edition of the works, vol. i. p. 74. This edition is quoted throughout this article). See also *De Corpore Politico* and *A Dialogue of the Common Laws*.

[3] *Leviathan*, Part. I. cap. xiii (vol. iii. p. 114).

clear—of course I am assuming for the moment the Hobbesian process of evolution—when we consider the laws that Hobbes enunciates. The "first, and fundamental law of Nature" is "to seek peace, and follow it." This is supplemented by what he calls "the sum of the right of nature"—namely, "by all means we can, to defend ourselves."

The original "state of war" gave to every one the right to everything. The first law of nature modifies that right by implication. The exact modification is contained in the second law, which runs as follows: "That a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself." The right given up is the right of hindering another's natural rights.[1] This is done in consideration of some right reciprocally transferred to the man who has transferred his right. "The mutual transferring of right, is that which men call CONTRACT." Where there is no mutuality the transfer of a right is a gift. When we reach this stage of "natural law" the existence of some definite coercive force becomes necessary, for where any part of a contract remains to be performed, there remains what Hobbes calls a "pact" or "covenant," and this has no reality unless it is enforceable.

"If a covenant be made, wherein neither of the parties perform presently, but trust one another; in the condition of mere nature, which is a condition of war of every man against every man upon any reasonable suspicion, it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void."

The coercive force, however, need not necessarily be a municipal force. All that is necessary is a force that will bind men to the performance of their covenants. "The passion to be reckoned upon is fear; whereof there be two very general objects: one, the power of spirits invisible; the other, the power of those men they shall therein offend. Of these two, though the former be the greater power, yet the fear of the latter is commonly the greater fear. The fear of the former is in every man, his own religion: which hath place in the nature of man before civil society."

This last is a very significant sentence, for it refers back the true binding power of the "laws of nature" to a religious and external power. Hobbes declares that a covenant between two men not subject to civil power is concluded by each party swearing by the God that he feareth; but adds "it appears also, that the oath adds nothing to the obligation. For a covenant, if lawful, binds in the sight of God, without the oath."

[1] We may compare this statement with the definition of right in Dante's *De Monarchia*. "The real and personal proportion of man to man, which, when preserved, preserves human society, and when infringed, infringes it" (Mr. Wicksteed's translation). Dante refers to the Digests: ***Jus est ars boni et æqui.***

If we turn to the essay on *Liberty*[1] we find the law of nature there described as the "dictate of right reason." Hobbes warns the reader that "all authors agree not concerning the definition of *the natural law*, who notwithstanding, do very often make use of this term in their writings." This want of unanimity has not disappeared in the two centuries and more that have passed since the death of the philosopher.

Hobbes was sufficiently frugal in his output of juridical thought. This essay on *Liberty* contains in the second and third chapters practically a transcript of the chapters in the *Leviathan*, dealing with the laws of nature.[2] The law of nature is defined as "the dictate of right reason" and then the first and fundamental law of nature is stated as follows: "That peace is to be sought after, where it may be found; and where not, there to provide ourselves for helps of war." From this is derived "the first special law" corresponding to the second law of nature given above. Thus the "first special" law runs as follows: "That the right of all men to all things ought not to be retained; but that some certain rights ought to be transferred or relinquished."

The third chapter of the essay on *Liberty*, entitled "Of the other Laws of Nature," follows the fifteenth chapter of the first part of the *Leviathan*. The second special law is "to perform contracts, or to keep trust." This, we are told in the essay on *Liberty*, "is a precept of the natural law" since it is "a thing necessary for the obtaining of peace." In the *Leviathan* we are told that "in this law of nature, consisteth the fountain and original of JUSTICE." It is interesting to compare this with Plato's definition of justice[3] as a kind of natural harmony and healthy habit of mind. Justice, says Dante in the *De Monarchia*, is a certain straightness or rule, rejecting the oblique on either side. Bentham varies the conception: "Of two opposite methods of action do you desire to know which should have the preference? Calculate their effect in good and evil, and prefer that which promises the greater sum of good." Hobbes is really, however, as utilitarian as Bentham, as equity-loving as Dante. "The greater sum of good" is always the end aimed at. "Justice . . . is a rule of reason, by which we are forbidden to do anything destructive to our life; and consequently a law of nature." This utilitarian conception is brought out in his seventh law, which declares that the degree of punishment must depend on the good that punishment produces. "Men look not at the greatness of the evil past, but the greatness of the good to follow." The ninth law anticipates the doctrine of Rousseau: "that every man acknowledge another for his equal by nature."

[1] Vol. ii. p. 16.

[2] The first part of the treatise *De Corpore Politico* (Molesworth, vol. iv.) also deals fully with the laws of nature following the division into a primary law and secondary laws. See also the *Answer to Bishop Bramhall* (Molesworth, vol. iv.) and *A Dialogue of the Common Laws* (Molesworth, vol. vi.).

[3] *Republic*, Book IV.

Both in the essay on *Liberty* and in the *Leviathan* we have the same high view of the laws of nature set forth. In the first we read that "the laws of nature are immutable and eternal: what they forbid can never be lawful; what they command, can never be unlawful," and in the latter "the laws of nature are immutable and eternal; for injustice, ingratitude, arrogance, pride, iniquity, acception of persons, and the rest, can never be made lawful. For it can never be that war shall preserve life, and peace destroy it. The same laws, because they oblige only to a desire and endeavour, I mean an unfeigned and constant endeavour, are to be observed. For in that they require nothing but endeavour, he that endeavoureth their performance, fulfilleth them; and he that fulfilleth the law, is just."

Hobbes in the next development of his doctrine of natural law is brought face to face with the difficulties that belong to the conception. He is logically led to declare that since the man who fulfils the natural laws is just, "the science of them is the true and only moral philosophy. For moral philosophy is nothing else but the science of what is *good* and *evil* in the conversation and society of mankind. . . . Now the science of virtue and vice, is moral philosophy; and therefore the true doctrine of the laws of nature, is the true moral philosophy."[1] He adds in the essay on *Liberty* that "all writers do agree, that the natural law is the same with the moral." Are then these statements in fact laws? Hobbes of course feels the difficulty: "Those dictates of reason, men used to call by the name of laws, but improperly: for they are but conclusions, or theorems concerning what conduceth to the conservation and defence of themselves; whereas law, properly, is the word of him that by right hath command over others. But yet if we consider the same theorems, as delivered in the word of God, that by right commandeth all things; then are they properly called laws."[2] Here then we are again thrown back on a supernatural power from whom law issues as "the command of him or them that have coercive power." The apparently automatic punishment involved in the breach of natural laws led, empirically, to the recognition of those laws; led to their formulation as laws obedience to which is an antecedent condition to life itself; led to the recognition of the creative force behind nature, as the Law-giver from whom proceed the laws or conditions obedience to which will secure the safety of the creature. He who creates a living thing must create a cage for it to dwell in; must in fact formulate the conditions that will enable the creature to live and prosper. Those conditions are contained in the so-called laws of nature. That appears to be the position adopted by Hobbes. It is the argument from design inverted. In that argument from the laws of nature we infer God. Here we refer the laws of nature to God as an intuitive conception.

[1] *Leviathan*, vol. iii. p. 147.

[2] *Ibid.* Part I. cap. xv.; see also the essay on *Liberty*, cap. iii., and *De Corpore Politico*. Compare Dante's affirmation in the *De Monarchia* that "Right, since it is a good, exists primarily in the mind of God."

Kant and the Laws of Nature.—Immanuel Kant has something of Hobbes's idea in his *Metaphysic of Morals*. There he treats of obligatory laws for which an external legislation is possible. These he calls external laws: "Those External Laws, the obligatoriness of which can be recognised by reason *a priori* even without an External Legislation, are called Natural Laws. Those laws again, which are not obligatory without Actual External Legislation, are called Positive Laws. An External Legislation, containing pure Natural Laws, is therefore conceivable; but in that case a previous Natural Law must be pre-supposed to establish the authority of the Law-giver by the right to subject others to obligation through his own act of Will."[1] Hobbes had no difficulty in pre-supposing this previous natural law. The relationship of Creator and created gives birth to such a law. When Kant declares that "the Law which is imposed upon us *a priori* and unconditionally by our own Reason may also be expressed as proceeding from the Will of a Supreme Law-giver or the Divine Will," his position is practically identical with that of Hobbes. Nor would Hobbes have quarrelled with the conclusion that "such a Will as Supreme can consequently have only Rights and not Duties; it only indicates the idea of a moral Being whose Will is Law for all, without conceiving of Him as the Author of that Will." The laws of nature, said Lord Verulam in his *Confession of Faith*, are "nothing but the laws of the creation," "they began to be in force when God first rested from His works and ceased to create." In his famous argument in the *Case of the Post-Nati of Scotland* he declared that the law of nature underlay municipal law, since from that law flow preservation of life, liberty, and the society of man and wife—in fact, the elements of human society. Hobbes perhaps adopted from Bacon, with whom at one time he had close intercourse,[2] this conception of natural law—a noble conception, for it enables us to see the basis of natural law upon which the palace of municipal law must be built. Natural law in the Baconian or Hobbesian or Kantian sense must precede in the natural evolution of society not only the artifices of the political law-giver, but even the iron rule of custom. These thinkers are concerned with the beginnings of law in human society, with something that lies behind even the earliest customary forms. This something is not natural law in the sense of natural sequence, "the *will* or *ought* of natural sequence," to use Sir Frederick Pollock's phrase,[3] but is akin to "the *ought* of rational conduct and ethical duty" which the early mind confounded with the inevitableness of sequence in nature.

Hobbes the Lawyer.—Whence did Hobbes derive his doctrine of the law of nature? Possibly through Bacon, but more probably through Bacon's law-books. Hobbes in *A Dialogue of the Common Law* tells us directly or by implication of the law-books that he had read and studied. Now he was no

[1] Kant's *Philosophy of Law* (W. Hastie), p. 33.

[2] Hobbes is said to have been one of the hands that translated *The Life of Henry VII.*

[3] *Laws of Nature and Laws of Men.*

professional lawyer.[1] The civil law at Oxford never captured him, nor did he haunt the Inns of Court or Chancery in London save as the friend of Bacon and Selden. He was not, nor did he ever purpose to become, a professional lawyer. But at some time or another he had a perfect banquet of law. He tells us [2] that he had "looked over the titles of the statutes from Magna Charta downward to this present time. I left not one unread, which I thought might concern myself; which was enough for me, that meant not to plead for any but myself. . . . I have also diligently read over Littleton's book of *Tenures*, with the commentaries thereupon of the renowned lawyer Sir Edward Coke." He goes on to praise Coke for declaring "that reason is the soul of the law" and expanding the expression "Nihil, quod est contra rationem, est licitum" into a complete scheme of law. He gives us Bracton's definition of law: "Lex est sanctio justa, jubens honesta, et prohibens contraria." He calls Bracton "the most authentic author of the common law," and quotes freely from him, in addition to Fleta, and Fitzherbert. He exhibits a full knowledge of the history of procedure in England. He uses Coke's *Institutes* with ease and judgment. He quotes Christopher St. German's *Doctor and Student*—a most significant fact. He was closely familiar with Roman law and Roman legal procedure; his knowledge of the statute and common law was intimate; while some of the obscurer legal problems are dealt with in professional manner. He must have read the reports available in his day, and did not restrict himself to the more notable, for in dealing with "Crimes Capital" he says: "Also I find in the reports of Sir John Davis, Attorney-General for Ireland, that in the time of King Henry VI. a man was condemned of treason for saying the King was a natural fool, and unfit to govern."

Hobbes does not spare his criticism of Coke. He declares: "Truly I never read weaker reasoning in any author of the law of England, than in Sir Edward Coke's *Institutes*, how well soever he could plead." The lawyer with whom the philosopher holds this dialogue replies: "Though I have heard him much reprehended by others as well as by you, yet there be many excellent things, both for subtilty and for truth, in these his *Institutes*." Hobbes answers with cutting contempt: "No better things than other lawyers have, that write of the law as of a science. His citing of Aristotle,

[1] One is almost forced to believe that Hobbes had a legal training, but a search has proved fruitless. There was a Thomas Hobbes called to the Bar at Lincoln's Inn in 1505, another called at Gray's Inn 1592. The first date is a century, the second a few years too early. A Thomas Hobbes of the Middle Temple was practising as a common attorney after 1635, and had been a gentleman of the House since 1620. But he is not the philosopher. Yet the statement "I meant not to plead for any but myself" suggests entrance at an Inn of Court or Chancery. It may well be that Hobbes was entered at an Inn of Chancery. Unfortunately the records of the Inns of Chancery are scattered among private hands, and for the most part are probably destroyed. If any are in existence they should be deposited at the British Museum.

[2] *A Dialogue of the Common Law*, vol. vi. p. 3.

and of Homer, and of other books which are commonly read by gownmen, do, in my opinion, but weaken his authority; for any man may do it by a servant."

Edmund Plowden.—Hobbes's knowledge of law-books must have extended to those mines of legal learning and metaphysical thought, Plowden's *Reports* and *Quæries*. Edmund Plowden, who was born in 1518 and died in 1585, is reputed to have been the most learned lawyer of the Tudor period, and his published works certainly sustain his reputation. He was a man whose intellectual attainments were both feared and respected in his own time. As an unflinching Roman Catholic he was prepared, if necessary, to defend his position against both Crown and Parliament, relying upon the weight and reasonableness of the common law. In the very year (1554) that he was acting as a justice of gaol delivery in the county of Salop, he withdrew from Parliament as a protest against their proceedings, and in answer to a charge of contempt he "took a traverse full of pregnancy" so effectively that the Attorney-General in post-haste dropped the matter. Famous in the history of the Middle Temple as Treasurer when the great Hall was a-building, he was at the time regarded with suspicion as the shelterer within the precincts of the Inn of many papists. He worshipped openly as a Roman Catholic and defied all legal proceedings. His one act of abnegation for the faith was a tribute to his brilliancy and independence. Queen Elizabeth offered him the woolsack. Acceptance would have involved a repudiation of Rome, and he refused the honour with simple dignity. A great figure in a great age, he left behind him a reputation that has become almost legendary. In him were enshrined all the wisdom and all the principles of that common law which the Middle Ages, ending at about the date of his birth, had compiled for the use of Englishmen. Three years after Plowden's death Hobbes was born, and when some thirty years later he turned to the study of English law, Plowden's reputation as an authority had reached its height. Hobbes must therefore of necessity have used the *Reports* and the *Quæries*, and in fact we find that from those sources he drew some of his most original thoughts about law and government.

In certain cases recorded in *The Reports* we get the laws of nature and of reason explained and examined with elaboration and force. Serjeant Morgan in the case of *Colthirst* v. *Bejushin*[1] speaks of "Reason, which is the Mother of all Laws." The case which deals most elaborately with the law of nature is, however, *Sharington* v. *Strotton*[2]—the report of which deserves the most careful attention from students of the history of law. In this case we find Aristotle and *The Politics* quoted freely, while the Law of Nature is treated in precisely the manner that it was subsequently treated by Hobbes. We read in the argument of the common law pursuing the

[1] Common Bench, 4 Ed. VI. *The Reports*, London, 1779, at p. 27. See also 1 Finch 4; 2 Finch 4; *Doct. and Stud.* lib. i. cap. ii.

[2] 7 & 8 Eliz. *The Reports*, at p. 303.

dictates of nature; of "the Law of Nature, the Law of Reason, and the Law of God"; that "there is nothing ordained in our law contrary to Nature or Reason, or the Law of God"; that "the elder brother is bound by the Law of Nature to aid and comfort his younger brother, as the father is the son." In the argument, again, Bromiley and his Apprentice allege that "things proceeding from nature are respected not only in philosophy, but also in our law, and are of great force and operation in our law, and therefore are esteemed to be good and sufficient considerations. From whence it follows that the consideration of Andrew Baynton here expressed for the provision of his heirs males is a sufficient consideration to raise a use in the land." "Every man has a natural desire to leave the substance which he has gotten by toil and labour to one of his own blood." Catline C.J. upheld this position. "And the Apprentice said, May it please your lordship to show us, for our learning, the causes of your judgment. And Catline said, It seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument 'Naturæ vis maxima,' I say 'Natura bis maxima,' and it is the greatest consideration that can be to raise a use."

In the *Case of Mines*[1] we read of "the common law, which is no other than pure and tried reason"; "the common law, which is grounded upon reason." In this case we also find embedded Hobbes's doctrine of sovereignty, and on this account the case must take an important place in the history of politics. The following sentence exactly summarises one aspect of the position Hobbes adopted: "The office of the king, to which the law has appointed him, is to preserve his subjects; and their preservation consists in two things, viz. in an army to defend them against hostilities, and in good laws." Reference, in this matter, must also be made to the *Case of the Dutchy of Lancaster*,[2] in which the metaphysics of the dual personality resident in kingship are duly elaborated by Plowden. The king is "a body politic and a body natural together indivisible." Hobbes's views on statute law may be compared with some of the statements on the same subject, contained in various cases reported by Plowden. In the *Earl of Leicester* v. *Heydon*[3] we read that "every subject is party and privy to an Act of Parliament." In the very important case of *Partridge* v. *Sharpe and Croker*[4] we are given an interesting doctrine of interpretation: "Words which are no other than the verberations of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is the makers of the statutes. And if they are dispersed, so that their minds cannot be known,

[1] 9 & 10 Eliz. *The Reports*, p. 316.
[2] 4 Eliz. *Reports*, p. 213.
[3] 13 Eliz. *Reports*, p. 396.
[4] 6 & 7 Ed. VI. *Reports*, 83.

then those who may approach nearest to their minds shall construe the words, and these are the sages of the law, whose talents are exercised in the study of such matters." Again, in the same case (p. 88) we are told "that, which law and reason allows, shall be taken to be in force against the words of statutes. . . . So that there they would not expound the statute contrary to what the common law and common reason allowed, notwithstanding the words were against it." Again, in the case of *Fulmerston* v. *Steward*[1] we are told that "the judges have expounded the text which is general to be but particular, which exposition is contrary to the text, because the text is contrary to reason." In the case of *Stowel* v. *Lord Zouch*[2] the weight of the common law is more openly magnified: "The way to apprehend the sense [of an Act] is to consider the common law, which is the ancient of every positive law." Indeed the judges are "to approach as near as they can to the reason of the common law." The same case gives us that end of all law upon which Hobbes dwells. "Peace and concord is the end of all laws, and . . . the law was ordained for the sake of peace." "The law hath no other end but repose, and the law was ordained to put a stop to contention, and to make peace." The law of nature, the necessity of things, moreover lies behind everything else. "Where the words of a law are broken to avoid a greater inconvenience, or by necessity, or compulsion, or involuntary ignorance, in all these cases the law itself is not broken."[3] This position recalls Bacon's doctrine (in his *Maxims of the Law*), "Necessitas inducit privilegium quoad jura privata."

It would be possible greatly to multiply the instances where Hobbes is indebted to the common law and common sense of Plowden. That he studied his works there can be no manner of doubt. The great Selden was also drawn upon, and last but not least Christopher St. German.

John Selden.—"Our learned Selden" (1584—1654) was on terms of intimacy with Hobbes, and many and fierce were the battles that they fought on fundamental issues. Richard Baxter tells us, quoting Sir Matthew Hale, that Selden "was a great adversary to Hobbs his errors; and that he had seen him openly oppose him so earnestly, as either to depart from him, drive him out of the room." One must grieve that no Boswell has recorded these conversations between two of the greatest intellects that England has produced. That they modified each other's outlook there can be no doubt. We may compare the following passage from Selden's *Table-Talk* with the general position adopted by Hobbes with respect to the sanction attaching to the Law of Nature:

"I cannot fancy to myself what the Law of Nature means but the Law of God. How should I know I ought not to steal, I ought not to commit adultery, unless somebody had told me so? Surely 'tis because

[1] 1 & 2 P. & M. *Reports* 109; see also *Stradley v. Steward*, 2 Eliz. pp. 804-5.
[2] 4 Eliz. pp. 363-5 [3] *Reniger v. Fogosse*, 4 Ed. VI. *Reports*, p. 18.

I have been told so? 'Tis not because I think I ought not to do them, nor because you think I ought not; if so, our minds might change. Whence then comes the restraint? From a higher Power, nothing else can bind. I cannot bind myself, for I may untye [*sic*] myself again; nor an equal cannot bind me, for we may untie one another. It must be a superior Power, even God Almighty. If two of us make a bargain, why should either of us stand to it? What need you care what you say, or what need I care what I say? Certainly because there is something about me that tells me *Fides est servanda*, and if we alter our minds and make a new bargain, there's *Fides servanda* there too." [1]

Again, the definition of King is not far from the fundamental ideas of Hobbes: "A King is a thing men have made for their own sakes, for quietness sake." On the other hand essential differences appear when Selden declares that "Every law is a contract between the King and the People, and therefore to be kept." Many other passages, however, show that this was not Selden's true position.

Christopher St. German.—*The Dialogue of the Common Laws* amply proves that Hobbes knew all that was to be known in the way of the theory, philosophy, and history of law in his day. It is indeed impossible to resent the conclusion that he was a pupil, a very apt pupil, of Francis Bacon and absorbed all that that master-mind had to teach in the way of law. Probably they both obtained their theory of the law of nature from Christopher St. German (1460?—1540), the author of *Doctor and Student* and *A Treatise concernynge the Power of the Clergye and the Lawes of the Realme*, and famous for his controversies with Sir Thomas More. The Dialogue between a Doctor of Divinity and a Student of the laws of England first appeared in 1518,[2] and it at once became a text-book which was not displaced by Blackstone. An eighteenth edition of an English version appeared in 1815, dedicated "to the young students and professors of law in the general Inns of Court." It is still apparently in practical use in America. In the first Dialogue we are told that there is a law eternal, itself unknowable, but which may be revealed to man either by the light of the natural understanding which gives us the law of reason, or by heavenly revelation which gives us the law of God, or by the order of a prince "that hath a power to set a law upon his subjects," which gives us the law of man.

> The law of reason is written in the heart of every man . . . teaching him what is to be done, and what is to be fled . . . the law of reason ordereth a man to the felicity of this life . . . the law of reason teacheth, that good is to

[1] *Table-Talk, being the Discourses of John Selden, Esq^r. : or his Sence of various matters of Weight and High Consequence relating especially to Religion and State* (1689). Reprinted by Edward Arber, 1868.

[2] So it is stated in the 1815 edition, but the *Dictionary of National Biography* says 1523.

be loved, and evil is to be fled: also that thou shalt do to another, that thou wouldest another should do unto thee; and that we may do nothing against truth; and that a man must live peacefully with others; that justice is to be done to every man; and also that wrong is not to be done to any man; and that also a trespasser is worthy to be punished; and such other. Of the which follow divers other secondary commandments, the which be as necessary conclusions derived of the first. As of that commandment, that good is to be beloved; it followeth, that a man should love his benefactor; for a benefactor, in that he is a benefactor, includeth in him a reason of goodness, for else he ought not to be called a benefactor; that is to say, a good doer, but an evil doer: [Cic. l. 2, *De Legibus*] and so in that he is a benefactor, he is to be beloved in all times and in all places. And this law also suffereth many things to be done: as that it is lawful to put away force with force: and that it is lawful for every man to defend himself and his goods against an unlawful power. And this law runneth with every man's law, and also with the law of God, as to the deeds of man, and must be always kept and observed, and shall always declare what ought to follow upon the general rules of the law of man, and shall restrain them if they be anything contrary to it."[1]

It is clear enough that Hobbes's laws of nature are derived direct from Christopher St. German, though no doubt they are modified by some knowledge of the *De Monarchia* of Dante, of, possibly, the works of Marsilio, and of the classical sources from which the pre-Reformation lawyer derived his conceptions. Sir Frederick Pollock in his volume on *The Expansion of the Common Law*, p. 109, dealing with the fifth chapter of the first Dialogue notes that—

> The Student of the laws of England, being asked by the Doctor of Divinity what he had to say of the law of nature, makes answer that among common lawyers the term is not in use, but they speak of reason where a canonist or civilian would speak of the law of nature. "It is not used among them that be learned in the laws of England, to reason what thing is commanded or prohibited by the law of nature, and what not, but all the reasoning in that behalf is under this manner. As when anything is grounded upon the law of nature, they say, that reason will that such a thing be done; and if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done." It is curious that this passage should have been, so far as I know, completely overlooked; but the mediæval tradition of the law of nature was broken up by the controversies of the Reformation, and seventeenth-century writers are quite confused about it.

This, however, hardly applies to Thomas Hobbes. He almost certainly knew the passage here quoted. Sir Frederick Pollock points out that, directly or indirectly, "the law of nature, as accepted throughout the Middle Ages, was derived from Greek theories of ethics." Hobbes carried on the mediæval doctrine, and in a new and non-scholastic guise handed it down to the jurists and philosophers of the eighteenth and nineteenth centuries. If Hobbes had no other claim as a jurist, he could claim that he revived for the purposes of social philosophy and juridical thought the whole

[1] *Doctor and Student*, Dialogue I. cap. ii.

mediæval conception of the law of nature. The *Leviathan* carried Hobbes's ideas far and wide, and Christopher St. German became the unconscious cause of a great new development of a conception that had suffered many things from many thinkers, on its way from Greece to Western Europe through Rome.

Hobbes probably took the dialogue form for his work on the common law from St. German's treatise, but the *Dialogue of the Common Laws* has brilliant literary qualities not altogether shared by the fine translation of the *Dialogus de Fundamentis Legum et de Conscientia.* If Hobbes developed in the *Leviathan* for future use the idea of natural law, in his Dialogue he attempted to add a new sanctity to the idea of the common law.[1] It is natural reason, natural equity, philosophy itself. The philosopher defines a law as "the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do." The distinction between *law* and right is next attempted, with bitter jibes at Coke for his ignorance in the matter. "Law obligeth me to do, or forbear the doing of something; and therefore it lays upon me an obligation. But my right is a liberty left me by the law to do anything which the law forbids me not, and to leave undone anything which the law commands me not. Did Sir Edward Coke see no difference between being bound and being free?" Hobbes goes on to show that Bracton's doctrine concerning the rights of sovereignty "is the ancient common law, and that the only bridle of the kings of England ought to be the fear of God."[2] The supreme power of the king leads to an elaborate discussion "Of Courts." Hobbes proves that "the jurisdiction of Courts cannot easily be distinguished, but by the king himself in his Parliament. The lawyers themselves cannot do it; for you see what contention there is between Courts, as well as between particular men." In the course of this and other discussions, the unhappy Sir Edward Coke is trampled under foot with a vigour peculiar to Hobbes. There is a certain ingratitude in the insults that are levelled at him, for Hobbes learnt much of his law from the *Institutes.* However, the reason for the attacks is plain enough. He is accused of quoting an expired statute "on purpose to diminish, as he endeavours to do throughout his *Institutes*, the King's authority, or to insinuate his own opinions among the people for the law of the land." An even more serious charge follows: "He endeavours by inserting Latin sentences, both in his text and in the margin, as if they were principles of the law of reason, without any authority of ancient lawyers, or any certainty of reason in themselves, to make men believe they are the very ground of the law of England." It was in much the same spirit that he attacked Wallis of the Royal Society in later years.

[1] Derived from Plowden's *Reports.*

[2] Compare the statement in the *De Monarchia* "It is plain that the authority of the temporal monarch descends upon him without any mean from the fountain of universal authority.

Hobbes could not be moderate in controversy: he must needs slay, even if he has to do it with the jawbone of an ass.

Hobbes and the Law.—A perusal of the *Dialogue* exhibits not only Hobbes's fine knowledge of English law, not only his dialectical power by which he squares the common law with his doctrine of kingship, but a keen insight into the abuses of the legal system in vogue in his day, and for more than two centuries after his day. Some brief extracts will show his general attitude and his reforming policy towards the law. "That the reason which is the life of the law should be not natural, but artificial, I cannot conceive. . . . Obscure also are the words *legal reason*. There is no reason in earthly creatures, but human reason." Now declaring that "reason is the common law," he asks, "To what end were statute laws ordained, seeing the law of reason ought to be applied to every controversy that can arise?" The answer is, "That the scope of all human law is peace,[1] and justice in every nation amongst themselves and defence against foreign enemies." "But what is justice?" "Justice is giving to every man his own." "The definition is good, and yet it is Aristotle's. What is the definition agreed upon as a principle in the science of the common law?" "The same with that of Aristotle." "See, you lawyers, how much you are beholden to the philosopher;[2] and it is but reason; for the more general and noble science and law of all the world is true philosophy, of which the common law of England is a very little part." The argument then proceeds that it is "a dictate of the law of reason, that statute laws are a necessary means of the safety and well-being of man in the present world, and are to be obeyed by all subjects, as the law of reason ought to be obeyed, both by King and subjects, because it is the law of God." But statute laws must be "laws living and armed." The laws are made by the king and he must have an army to enforce them. Moreover, "the king's reason, when it is publicly upon advice and upon deliberation declared as that *anima legis*; and that *summa ratio* and that equity, which all agree to be the law of reason, or all that is or ever was law in England, since it became Christian, besides the Bible." The king, Hobbes declares, has an unlimited right to levy soldiers and money for the defence of his people. Did not Oliver "when their new republic returned into monarchy" do so? The king moreover is "the legislator both of statute law and of common law," since the king's reason supplies the place of the universal reason which gives the common law. The king, being the sole legislator, is also the sole judge. This leads to a consideration of the Courts of justice and equity—the former dealing with "the positive laws of the land," the latter with causes that are determined by the law of reason. The elaborate description of the Courts, of the various types of suits, and of the relation of pleas and suits to the theory of law and morals, is valuable reading, and shows the

[1] See Plowden's *Reports*, *Stowell* v. *Lord Zouch*, p. 365.

[2] See *Sharington* v. *Strotton*, Plowden's *Reports*, p. 303.

legal training that Hobbes passed through at some time or another. He is often enough dogmatic. He declares that "it is very plain by these letters-patent, that all causes temporal within the kingdom, except the pleas that belong to the exchequer, should be decidable by this Lord Chief Justice." The abuses of legal processes and of the Courts are frankly pointed out. "A pleader commonly thinks he ought to say all he can for the benefit of his client, and therefore has need of a faculty to wrest the sense of words from their true meaning, and the faculty of *rhetoric* to seduce the jury, and sometimes the judge also, and many other arts which I neither have, nor intend to study." "For my own part, I believe that men at this day have better learned the art of cavilling against the words of a statute, than theretofore they had, and thereby encourage themselves and others to undertake suits upon little reason. Also the variety and repugnancy of judgments of common law, do oftentimes put men to hope for victory in causes whereof in reason they had no ground at all: also the ignorance of what is equity in their own causes, which equity not one man in a thousand ever studied. And the lawyers themselves seek not for their judgments in their own breasts, but in the precedents of former judges: as the ancient judges sought the same, not in their own reason, but in the laws of the empire. Another, and perhaps the greatest cause of multitude of suits, is this, that for want of registering of conveyances of land, which might easily be done in the townships where the lands lay, a purchase cannot easily be had which will not be litigious. Lastly, I believe the covetousness of lawyers was not so great in ancient time, which was full of trouble, as they have been since in time of peace, wherein men have leisure to study fraud, and get employment from such men as can encourage to contention. And how ample a field they have to exercise this mystery in, is manifest from this, that they have a power to scan and construe every word in a statute, charter, feoffment, lease, or other deed, evidence or testimony."

A little before he has commented on the number of statutory informers, of concealers ("a number of cozeners, which the law may easily correct"), and attorneys. He felt with Bacon that the law was a miserable trade. Happily for him, unlike Bacon he had no need to live by it and could smoke his pipe and criticise in peace. He pleads for an extension of the power of the Court of Chancery, giving it the right to review the judgments of the Court of Common Pleas. The ideal he aimed at was the fusion of law and equity; to make all Courts Courts of Equity. Common law, he declares, *is* in its nature equity. "I would fain know to what end there should be any other Court of Equity at all, either before the Chancellor or any other person, besides the judges of the Civil or Common Pleas? . . . Besides seeing all Courts are bound to judge according to equity, and that all judges in a case of equity may sometimes be deceived, what harm is there to any man, or to the State, if there be a subordination of judges in

equity, as well as of judges in common law?" The judicial business of construing written laws is put with remarkable force.

"It cannot be that a written law should be against reason; for nothing is more reasonable than that every man should obey the law which he hath himself assented to. But that is not always the law, which is signified by *grammatical* construction of the letter, but that which the legislature thereby intended should be in force; which intention, I confess, is a very hard matter many times to pick out of the words of the statute, and requires great ability of understanding, and greater meditations and consideration of such conjuncture of occasions and incommodities, as needed a new law for a remedy. For there is scarcely anything so clearly written, that when the cause thereof is forgotten, may not be wrested by an ignorant grammarian, or a cavilling logician, to the injury, oppression, or perhaps destruction of an honest man. And for this reason the judges deserve that honour and profit they enjoy."

The whole of this discussion is intended to demonstrate the essential relationship of justice and equity. The final conclusion is that "justice fulfils the law, and equity interprets the law, and amends the judgments given upon the same law. Wherein I depart not much from the definition of equity cited in Sir Edward Coke (Inst. see xxi.); viz. equity is a certain perfect reason, that interpreteth and amendeth the law written; though I construe it a little otherwise than he would have done; for no one can mend a law but he that can make it, and therefore I say it amends not the law, but the judgments only when they are erroneous."

At this point the interlocutors turn to the subject of crimes and punishment. His doctrine of government ever in view—the development of that doctrine is the ultimate object of the entire Dialogue—Hobbes proceeds to define treason from the first principles of "mere natural reason." Treason involves "a designing of a civil war and the destruction of the people." And, since the safety of the people is the highest law, the doing of any act that endangers it is the highest crime, namely high treason. After discussing treason at length, he turns to felony, and there he amuses himself by attacking with vigour and brilliancy the views of Sir Edward Coke. The Lord Chief Justice is pursued with an animosity that is hardly conceivable to a modern mind. He deals in this spirit with the doctrine of constructive murder. "Sir Edward Coke says (3 Inst. p. 56) that if the act that a man is doing, when he kills another man, be unlawful, then it is murder."

"This is not so distinguished by any statute," replies the philosopher, "but is the *common law* only of Sir Edward Coke. I believe not a word of it. If a boy be robbing an apple-tree, and falleth thence upon a man that stands under it and breaks his neck, but by the same chance saveth his own life, Sir Edward Coke, it seems, will have him hanged for it, as if he had fallen of prepensed malice. All that can be called crime in this business is but simple trespass, to the damage perhaps of sixpence or a

shilling. I confess the trespass was an offence against the law, but the falling was none, nor was it by the trespass but by the falling that the man was slain; and as he ought to be quit of the killing, so he ought to make restitution for the trespass. But I believe the cause of Sir Edward Coke's mistake was his not well understanding of Bracton, whom he cites in the margin."

Hobbes goes on to show that where the act is in itself evidence of a felonious purpose, the death would be murder. Certainly modern practice is nearer the view of Hobbes than that of Coke. He has not done with Coke yet. On another matter the philosopher angrily cries out, "If his definitions must be the rule of law, what is there that he may not make felony or not felony at his pleasure? But seeing that it is not statute law that he says, it must be very perfect reason or else no law at all; and to me it seems so far from reason, as I think it ridiculous." This is the attack on the doctrine that there can be no larceny of growing crops or fruits since they concern the realty.

The question of heresy fills much space. He raises the question as to the right to burn heretics. It is forbidden by statute and could not have been a custom incorporated in the common law. Sir Edward Coke is therefore again punished with sufficient severity. On the question of præmunire he has no peace, while Coke's statement that the general power of pardoning resides in Parliament and not in the king (except in the case of high treason, which is a crime against the king) is met with the retort that all crime is an offence against the king.

The Dialogue turns finally to the "laws of *meum* and *tuum*." Here we have much said concerning the origin and growth both of prosperity and sovereignty and Parliament. The note as to the origin of the English Parliament is of value, and with it the *Dialogue of the Common Laws* abruptly ends.

"The law is the public conscience"[1] is the note that rings through the *Dialogue*. Hobbes desired to make the civil law nearer to the natural law—to the law that has governed the wills of men, the law that deals with the inner man. We know what is right but cannot do the things that we would. Hobbes desired the civil law to carry the natural law into action and to become perfect equity. Hobbes had in mind a perfect commonwealth and deliberately claimed that if the opinions of law and policy expressed in his *Human Nature* and *De Corpore Politico* were held by men the kingdom of peace would be at hand: "it would be an incomparable benefit to the commonwealth, that every one held the opinions concerning *law* and policy here delivered."[2] All perfect laws, he held, sprang direct from God. "The law of nature, which is also the moral law, is the law of the Author of Nature, God Almighty; and the law of God taught by our Saviour Christ is the moral law."

[1] *Leviathan*, Part III. 29. [2] Dedication to William Earl of Newcastle.

To Hobbes law and policy form a consistent whole: and if considered as a whole, as a system for producing a stable human society, and not merely in its religious aspect, it would not seem so vulnerable as it apparently seemed to the Bramhalls of the eighteenth century.

Hobbes as a Jurist.—It is impossible to deny that Thomas Hobbes was a great jurist in the deepest sense of that term. He was not, as he sat in his study and smoked his famous pipe, merely weaving the sand of words and ideas. Despite his jest that if he read as much as other men he would be as ignorant as they, he was a great student of books and records. His knowledge of English law is evidence enough of that. He went to the realm of fact and practice for his ideas. He worshipped the common law because it was a fact and not a theory, because it represented the law evolved from the experience during long ages of the relationship of man to man. He was a modern thinker in the best sense: he worked from fact to theory, worked perhaps imperfectly enough, but raised up his doctrines of law and government upon the ancient and current experiences of the English nation. It is in this fact that his work and thought are likely to outlive in philosophic influence the work and thought of Locke and Rousseau,—in so far as those thinkers did not base themselves on the far-reaching speculations of Hobbes himself. The influence of Hobbes as a thinker, indeed as a prophet, is likely to increase rather than diminish, for he preached a doctrine of governmental despotism that modern nations are rapidly realising. Mr. Jethro Brown in his recent book on *The Austinian Theory of Law* says that "it may be noted, however, that the theory of Hobbes finds expression for government but not for the State, while that of Rousseau finds an expression for the State but none that is adequate for the government. The path taken by Hobbes leads on to governmental despotism; that taken by Rousseau to the despotism of majorities. While Locke may be said to have apprehended the existence both of the State and the government, his doctrine surely lends itself to an individualism of which the final outcome must be anarchy." Hobbes may not have chosen the better path, but he certainly chose the path indicated by the experience of his own day, by the manner in which the laws of England developed, and by the conception of natural law which he derived from mediæval jurists, thinkers, and lawyers. He chose the only possible method that would in a measure reconcile individualism and despotism. The despotism of majorities, he knew well enough, was bound to deteriorate into that "rule or the usurping of the popular or rascall and viler sort" called the Δημοκρατίαν ἁπαντῶν "because they be moe in number," of which Sir Thomas Smith writes in his *De Republica Anglorum*.[1] He looked forward instead to a system of governmental despotism, and who shall say that we have not attained to his grim ideal? It is true that those who "be moe in number" make and unmake governments, and in some appreciable measure modify this or that political outlook,

[1] Lib. i. cap. iii.

this grievance or some other, the tax or rate of last year or the year before. But the great governmental machine grinds on independent of majorities and of the political sky. Hobbes knew this as well as we do. He knew that Cromwell, successful in all else, failed hopelessly when he touched the governmental machine. The history of national finance in the later years of the Commonwealth shows that it is one thing to substitute one ruler for another, and quite another thing to interfere with the machinery of government. Hobbes was far too acute an observer not to realise that the end of government is social equilibrium, and that social equilibrium is impossible under the fluctuating despotism of majorities or the unordered despotism of the individual.

The fact that perhaps most strikes the imagination of the lawyer in regarding the social philosophy put forward by Thomas Hobbes is the remarkable fashion in which he gathered and dealt with his legal material. No source was too obscure, no legal record too dusty for him to use. From the dry-as-dust sources of mediæval philosophy, from the scattered mines of the common law he drew material that enabled him to restate as part of an ordered theory of government the law of nature and the application of that law to the community (then in a state of flux) amidst which he lived. He was a jurist of the profoundest type, for he formulated laws relating to society that have had an abiding effect on society throughout Europe ever since his time. His laws and conceptions were not those vivid imaginations of pure thought that charm the philosophic mind, and leave the world where they found it. They were conceptions founded upon the closest observation of the nature of the society amid which he dwelt, and of the evolution of a practical legal system through long ages in that society. He approached the problem of social government in the same scientific spirit as that in which Newton approached the problem of the laws governing the material universe, and it is probable that his influence on human thought in the region of sociology has not been less than the influence of Newton in the realm of applied science. In a very real sense Rousseau, Bentham, and Austin are descendants of Hobbes, while his methods are still the methods of those who are dealing with his problems to-day. Nor has his influence been evanescent in the obscure region of the philosophy of law. Kant directly or indirectly owes to him a debt not less great than the debt that he owes in another realm of thought to David Hume.

VII. VICO (1668—1744). PART I.

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THE golden age of Italian literature may be said to have passed away when, by the treaty of Castel Cambrésis, in 1559, the hegemony of the Austrian House of Spain was established over the peninsula, and the era of foreign domination had begun. The decrees of the Council of Trent completed the work of the counter-reformation, and before 1565 the old toleration of literary liberty had given place to a general policy of repression and obscurantism sufficient to chill all intellectual activity. Henceforth the main currents of European life were to be no longer essentially literary or artistic. The dynastic interests of France and Spain had become centres to which all that was best steadily gravitated.

The boundary mark between mediæval and modern Italy lies somewhere about the middle of the eighteenth century. Metastasio and Goldoni, Alfieri and Monti, show us the old art in process of transformation into the new. But they are not representatively Italian. Metastasio's tragedy is inspired by Corneille; the comedy of Goldoni by Molière. Their world is an artistic mistake. False heroics and degenerate pastorals, sensual music and tinsel ornamentation, betray their unworthiness to represent their predecessors. In the domain of history and philosophy, however, things wore a new and fruitful aspect. The wonderful erudition of Muratori had helped to throw light upon the darkest recesses of the past, and before the eighteenth century had opened Naples produced her most illustrious citizen, Giambattista Vico, whose profound originality of mind was enough to place him in the forefront of European learning.

Although it may be said that the story of a man of letters is best studied in his works, it is generally necessary, in order to form some clear notions of his relative value and of the manner in which his thought was moulded, to inquire into the conditions in which he lived and into the influences which produced him. Although Giambattista Vico was essentially a modern in spirit, he was born in an almost mediæval atmosphere. Naples in 1668, the year of his birth, was under the domination of the House of

Aragon. The Spanish viceroys who, since the time of Ferdinand the Catholic, had wielded almost supreme power in the province, were careless of the conduct of affairs, and usually corrupt. Far from Madrid, and holding in their own control the means of communication with the central Government, they hindered commerce by vexatious restrictions, and practised nepotism in its most ruinous forms. Provided they extorted a sufficient tribute and sent it regularly to Spain, the only check they had to fear was the anger of the Neapolitan populace. Brigandage had, in the seventeenth century, assumed unprecedented proportions: the bandits were protected by the nobles and, in time of sedition, boldly entered Naples to support one or other of the rival factions. Assassins claimed sanctuary in almost every church, and if they were of sufficient social importance were graciously protected by the Viceroy, who would intervene in open court on their behalf. False coiners abounded, some of them renegade monks, who, in one instance, when condemned to the hulks, placidly continued their trade with the connivance of their gaolers. One of the Viceroys, Benavides, himself emulated the enterprise of his subjects in producing false coin. The professional thieves in Naples were reckoned at 30,000, or three among every sixty of the inhabitants. Despite the lawlessness that prevailed, the Church in Naples had retained immense power over the people. She was by far the greatest landowner, and her dignitaries were able to carry out unfettered their schemes for their own aggrandisement or for that of their community. There were 16,000 ecclesiastics in the city of Naples, and the religious foundations were entitled to a third of every intestacy; the miracle of the liquefaction of the blood of San Gennaro—"miracolo da fare ogni Turco Cristiano"—was merely one of the host of similar prodigies in which the populace had an unswerving belief. In 1707, when the Spaniards had fled before the arrival of the victorious Austrians in Naples, it was by parading the image of San Gennaro that the more peace-loving citizens succeeded in averting a sanguinary tumult. The influence of the Church was all-pervasive, and it was often intolerantly exerted. When, in 1740, the Jews were allowed to enter Naples, the monks predicted innumerable evils to the king and his advisers. Astorino, a man remarkable for his intellectual capacity, was accused of having acquired his knowledge by witchcraft. Majello, who first introduced the Cartesian philosophy, was long the object of clerical persecution and Giannone, the author of the *Storia Civile*, although a friend of the Church, was, after the publication of his book, disowned by his countrymen.

In such surroundings only three careers were open to the intelligent or enterprising citizen. The armies of the Emperor and of the King of Spain were largely recruited from the Neapolitan nobility; the cloister afforded a safe and often pleasant retreat for the meaner classes who were content to seek bodily and mental peace within its walls and in the pages of Suarez

and Bellarmine. The law was the last profession wherein the unwarlike but more worldly-minded Neapolitan might find a livelihood.

Although the eleven systems of legislation which were simultaneously in vigour in the province of Naples must have afforded a rich pasture for its lawyers, it may be doubted if many of the four thousand *avvocati* who thronged the Courts can have had a substantial practice in a country where commerce was stagnant and political unrest had become endemic. The advocate was, however, often a person of influence and weight. He defended the noble whose privileges were infringed, and was often liberally rewarded by his distinguished patrons. The legal profession was, moreover, a means of attaining to high office and to literary distinction; many of the lawyers of the time have won a place on the roll of Italian literary celebrities. Naples had, however, little part in the early development of Italian literature. The communal life of Tuscany, which had produced Petrarch and Boccaccio, was rendered impossible by the maintenance of feudal institutions, and the character of the people, blended out of Greek, Saracen and Norman blood, was, perhaps, unfavourable to the formation of those currents of thought which, in other places, have found expression in distinctive schools of art and science.

An autobiography is, in many respects, an unsatisfactory source of information, but it is from the *Vita di G. B. Vico, scritta da sè medesimo*, that we are obliged to take nearly all that is known of its author's personality. This autobiography was written, at the request of the Conte di Porcia, to form one of a series of literary lives, and selected as the most fitted to head the series, although Vico protested his unworthiness of the honour. In writing his own life Vico adopted a method which renders it easy to trace the development of his mind and throws light on some of the obscurities of his other works. It affords a concrete example of the historical method which was to so great an extent the creation of Vico. His letters furnish further information, and are of assistance in the attempt to sketch the main occurrences of his life.

Antonio, the father of our philosopher, kept a small bookstall in one of the tortuous narrow streets that traverse the older parts of Naples. Though his parents were poor, Vico had a kindly recollection of them. "Lasciarono," he says, "assai buona fama di se." A fall from a ladder caused a fracture of the skull when he was seven years of age, and he was unable to work for three years. When he returned to school his disposition was melancholic but earnest, a fact which he attributed to his parentage; but his long illness and absence from youthful companions had, no doubt, helped to strengthen the natural bent of his character. Vico now set himself the task of making up for the time lost during his illness, and so rapid was his progress that he was soon permitted to enter the senior class. His father, soon afterwards, sent him to the Jesuits' school, where he competed successfully with the most brilliant of

their pupils. He believed himself treated unjustly by his teachers, and left to pursue his studies alone. Becoming absorbed in his task, he no longer observed regular hours, and his mother, he tells us, more than once found him, at daybreak, still poring over his books. To assist his private studies Vico attended the lectures of a Jesuit named Del Balzo, and was by him recommended to read Pietro Ispano and Paolo Veneto, two decadent scholastic writers whose learned incomprehensibilities proved so unpalatable to his clear-thinking mind that he abandoned work for eighteen months. The meeting of a society known as the "Accademia degli Infuriati" recalled him to himself. As he quaintly expressed it, he had been like a charger after training, put to pasture for a time, and he now returned to the strife at the sound of the trumpet of learned discussion. The teaching of another Jesuit inspired, in Vico, an admiration for the greater scholastic writers, and he seems to have sought acquaintance with Greek philosophy in Scotus and similar writers. The fame of the philosophic Jesuit Suarez of Granada induced Vico to make a special study of him, but it is a remarkable fact that not alone is no trace of the ideas expounded in the *Tractatus de Legibus* to be found in Vico, but he does not once refer to its author. The desultory course which Vico had hitherto pursued in the acquisition of learning might, perhaps, have led him far from the fields in which he was destined to take so brilliant a place. But when, one day, visiting the royal university he happened to listen to a law lecture at the moment when the professor was commending Vulteius to his hearers as the best commentator of the *Institutes*. Vico, seized with the desire of studying this author, persuaded his father to obtain a copy from a well-known lawyer. The latter saw the lad, and was so favourably impressed that he gave him the book as a present. It was thus, he tells us, that he was initiated into the study of jurisprudence. After he had mastered the principles of law, Vico at first thought of practising at the bar, and at the age of sixteen he successfully pleaded a case in defence of his father. His health was, however, precarious, and he was, by temperament, disinclined to take part in the noisy striving of the Courts. He sought distraction in versification, and made little or no progress in the profession he had chosen.

A happy chance at length afforded Vico the opportunity of meeting Rocca, bishop of Ischia. Struck by the ability with which he demonstrated the true method of teaching law, the bishop procured him the post of preceptor for his nephews, the sons of the Marchese di Vatolla. During the next nine years Vico lived in learned ease and retirement among congenial surroundings, with the use of an excellent library and leisure to pursue his studies. He devoted himself equally to the study of law and of literature. His interest in canon law led him to inquire into the Jansenist controversy, and he systematically read Dante and Virgil, Petrarch and Horace, noting the comparative merits of their languages and perusing each three times. It was during this period that Vico formed most of the

conceptions of Platonism and Aristotelianism which afterwards had considerable influence in moulding his system of thought. These conceptions reached him at second hand, through the treatises of scholastic and renascence writers, and they were consequently often misleading, if not entirely false. So little was he acquainted with Greek literature that he confounded Zeno the Eleatic with Zeno the founder of Stoicism.

When, in 1694, Vico returned to Naples he found himself out of touch with the intellectual life of the time. The teaching of the Italian renascence had been supplanted by an influx of French philosophy. The vogue which Cartesianism enjoyed had dulled the fame of Ficino and Pico della Mirandola. Contempt for classical learning and all authority had become almost universal, and the recluse issuing from the woods of Vatolla found himself a stranger in his own country. This estrangement must have proved, at the outset of his more public life, a serious obstacle to success. Staving off destitution by writing adulatory verses and by composing funeral orations, Vico at one time contemplated becoming a theatine monk, but the desire of serving his aged parents deterred him, and he set about obtaining employment. He was refused the post of secretary to the city of Naples, but ultimately, in 1697, he obtained a professorship of rhetoric in the university, with a salary only slightly exceeding 100 scudi. He married, shortly afterwards, Teresa Destito, the daughter of a scrivener, who was, however, herself unable to write even her name. His children did not reach to any distinction—except, perhaps, Gennaro, who succeeded his father in the chair of eloquence, but whose principal claim to recollection is, undoubtedly, his parentage.

The lectures delivered by Vico at the opening of seven academic years, together form the earliest consecutive embodiment of his views on education, a topic in which he always took particular interest. The discourse delivered in 1708 was subsequently published under the title *De Ratione Studiorum.* It is the earliest of Vico's writings in which clear indications of the subsequent progress of his mind are to be found. His aversion from the critical method of Descartes, his confidence in the spontaneous workings of the human mind, the cultivation of the memory and of the imagination, the merits of the "topics" of the rhetoricians, are points here touched upon with vigour, although not without some of the bias which always remained characteristic of him. Whilst teaching rhetoric, Vico still devoted his attention to legal studies. He gave lessons in jurisprudence, and wrote several brochures on the civil law. His assertion that the great Roman lawyers had been exclusively Patrician in origin, was the occasion of a controversy with the royal prefect of studies which ultimately resulted in the production of Vico's principal legal treatise, the *De uno universi iuris principio.* When in the following year (1721) the complementary volume, *De constantia Jurisprudentis*, had been published, Vico might not unreasonably have claimed to be one of the most distinguished jurists in Italy.

For some time previous to 1723 he had contemplated seeking a professorship of law, and on the death of Campanile, the principal morning reader in Civil Law, he presented himself as a candidate for the vacant chair. Besides the merit of his works, the fact that he was the senior member of the university, for which he had won considerable renown, led Vico to hope for success in the competition. Many forces militated, however, against his candidature. He was without personal or family influence, his political writings had, probably, created many enemies, and he was prevented, partly by his earnestness, from making a favourable impression on persons accustomed to cringing adulation. The competitors were given a day to compose a dissertation on one of several texts from the Digest, which were selected by drawing lots. The composition of Vico, which he distributed after it had been delivered, won the admiration of many distinguished men, but the professorship was awarded to Domenico Gentile, a person of whom nothing is now known. Vico henceforth lost all hope of recognition by his countrymen, and, although he lived to bless the adversities which had driven him back to his literary pursuits and thus enabled him, as he says in the autobiography, to wreak a noble vengeance on his detractors, his failure embittered his life and made his lot seem harder than before. But, however sad it may seem that none of the joys of worldly success should be his, we cannot regard the fact as unmitigated evil if we recollect that to it is probably due the production of the *Scienza Nuova*, Vico's most permanent contribution to the world's literature.

> Sempre natura, se fortuna trova
> discorda a se, come ogni altra semente
> fuor di sua region, fa mala prova.

The preoccupations which the possession of the chair he coveted would necessarily have entailed, might in all probability have turned him from the paths of research, in which he found a glory denied to his puny competitors. The *New Science* appeared in 1725. It was the logical development of his earlier work, and, by boldly dedicating it to the universities of Europe, Vico appealed to the tribunal of all the learned to judge his claim to intellectual greatness. Scarcely any writer is so entirely without precursors: Michelet was exaggerating but slightly when he declared: "Avant Vico le premier mot n'était pas dit; après lui, la science était, sinon faite au moins fondée." The historical method, which, in most departments of human knowledge, is of immense importance, and to which some owe their very existence, was the discovery of Vico.

In the light of this achievement his minor merits must of necessity pall. With the intuition of genius the author of the *Scienza Nuova* felt the greatness of his work; he had, as he expressed it, put on a new man. "Mi ha fermato," he says, "come sopra un' alta adamantina rocca, il guidizio di Dio, il quale fa giustizia alle opere d' ingegno con la stima dei saggi."

The remaining years of Vico's life were devoted to the revision of his great work and to the composition of some studies of minor importance. The second edition of the *Scienza Nuova* was dedicated to Clement XII. The Pope ordered his hearty approval to be conveyed to Vico, although he might reasonably have considered it far more subversive than the *De iure belli et pacis*, by which Vico had profited so greatly, but which had been placed upon the "Index expurgatorius." A third edition was published in 1744, but Vico was nearing the end of his life, and the notes and additions inserted by his son Gennaro rendered this edition obscure and worthless.

In 1735, at the instance of the principal chaplain of Charles of Bourbon, Vico was appointed royal historiographer. But favour had come too late. There is a deep melancholy in the closing scenes, which have been described for us by a devoted pupil named Solla. Although tortured by disease and far advanced in years, Vico continued to lecture on rhetoric and to give private instruction. "The throng of young men at his lectures was innumerable. He did not confine his teaching to mere precepts of rhetoric, but sought to broaden the minds of his hearers by apt illustration and instruction in general knowledge." "He taught," says his pupil, "tutto lo scibile." In his very dejection Vico preserved his greatness of character. His devotion to duty was complete, and the pupils whom he instructed at his house benefited by his great erudition and were carefully trained to think and to act worthily.—On January 20, 1744, he passed away whilst attempting to repeat one of the psalms. His friends and all the learned, says Solla, deeply regretted him, enmity was put aside, and envy hushed in the recollection that Italy had lost a great citizen.

Vico was of medium height, his features clear cut and somewhat aquiline. To his hasty temper was due much of the animosity he excited, but the latent fire of his nature was also a force which urged his genius forward, with splendid perseverance, towards the accomplishment of his task. If, in his weaker moments, quick outbursts of indignation afforded his adversaries a pretext for vilification, they were but indications of a strength of will which made it possible for him to bear up against "outrageous fortune."

Like our own Buckle, like Rousseau and many distinguished men, Vico had not enjoyed the advantages to be derived from following a regular course of studies. The fact is apparent upon the face of his writings. Their profundity and originality are, no doubt, greater than they might have been, had his mind been trained to conform to recognised literary precepts; but much of the obscurity of his thought must be attributed to his not having passed through any organised curriculum, and it can hardly be doubted that the involved style which rendered many of his writings unpleasant to read, and hindered his being duly appreciated by his contemporaries, was largely due to the same cause. Vico has been accused

of servility, and the charge cannot be said to be unfounded. His speeches, letters and biographies teem with overdrawn expressions of adulation. "Tam bonus erat laudator," says a contemporary, "ut immortalitatem donare posse putaretur." It is well, however, before passing judgment on him, to remember that to one of his lowly origin nobles and prelates must have appeared very great folk, and that it was only through their favour that he could hope to obtain a hearing at a time such as that in which he lived. His praise was often merely an ornate expression of gratitude, and to his countrymen cannot have sounded so excessive as to a less imaginative race. Let it be added, also, that no laudation was directed to the furtherance of a shameful end, nor to the stifling of what he believed to be true.

Although a tradition which is traced to Genovesi, a contemporary of Vico, ascribes the obscurity of his style to desire to conceal the heterodoxy of his opinions, the suggestion may be safely rejected in view of his manifestly religious spirit, and of the fact that he enjoyed the friendship of the ecclesiastical authorities, including even the censor himself. Vico's opinions contained much which the Church might fear, but, whether he was himself aware of their character or not, his good faith is unmistakable.

As has been said, Vico was imbued with a reverent spirit, his mind turned around deep religious convictions. Nothing is more strange than the frankness with which he accepts the adage "Multa sunt vera secundum philosophiam sed non secundum theologiam." Affirming propositions which had been hitherto regarded as contradictory to Scripture, Vico brushes the difficulty aside with the remark that his opinions relate to Gentile and not to Jewish history. In one to whom the human aspect of the Bible was unknown, such language is not, perhaps, so strange as it may seem to a modern ear, but the inconsistency of this position is best accounted for by the reflection that Vico was entirely unconscious of the subversive tendency of his historical method.

The teaching of Vico did not result in the formation of a distinct school of philosophy, as did that of Descartes and Locke; but during his lifetime and for a short period after his death, his admirers in Naples and even in the Northern Italian cities were both numerous and zealous. In the *Biografia degli uomini illustri di Napoli*, Martuscelli relates that Vico's house was the rendezvous of all the literary men of the time; and Romano, a contemporary critic, states that he feared to publish his work controverting Vico's historical opinions because of the number of the latter's adherents and of their strongly partisan feeling. "A great part of our city would," he says, "have supported Vico against any opponent." The same critic tells us that the "Vichiano," or fanatical Vico scholar, quickly became a type in which devotion to the master was not always equalled by general intelligence. Some there were, of these scholars, who would read nothing which Vico had omitted to explain. Such elements as these, although they help to show the attraction exercised

by an original mind, were hardly calculated to form the nucleus of a new system. A wider sphere of development presented itself in the North, and the interest which Vico excited at Venice, where the trammels of literature were less tightly drawn, made it seem for a while that his ideas had fallen on good ground. But the times were out of joint. Italy had ceased to take a prominent place among the thought-producing nations, and the hope of Vico to renovate her and win her a place beside Holland and Germany demanded the accomplishment of a task which was not to be completed before the lapse of more than a century. The greatness of Vico itself explains his failure. "He had," says Michelet, "forgotten the language of the past, and could speak only that of the future." When his speculations were at last made known to the nineteenth century their worth was, in many instances, no longer recognisable, because they had ceased to rank as discoveries. The first movement towards a better appreciation of Vico took place in Lombardy at the opening of the nineteenth century. A number of Neapolitan exiles published at Milan some critical essays on the system of their distinguished countryman, and there rapidly came into being a new growth of Vico literature which spread beyond the Alps when, in 1807, Wolf published a monograph in reply to the charge of having borrowed his Homeric theory from the *Scienza Nuova*. The publication of Niebuhr's *Römische Geschichte*, in 1811, brought Vico into still greater prominence, when it was pointed out that there was a remarkable resemblance between the view of early Roman history there propounded, and the almost forgotten hypotheses of the Neapolitan philosopher.

The final impulse, to which the complete recognition of Vico is undoubtedly due, was given by Michelet, who, in 1827, published a translation of the *Scienza Nuova* and of some of the minor works, accompanied by a very eulogistic introduction, in which the great historian's youthful zeal has, perhaps, led him to display too freely the enthusiasm of a discoverer. From thence forward the attention of eminent men has in many countries been directed to the study and elucidation of Vico. Cousin, Mill and Mancini were acquainted with the theories of the *Scienza Nuova*. Special studies on Vico have at intervals appeared in French, German and English, and although M. Penjon, writing in 1888,[1] declared "comme la mode était venue, elle a passé," if we judge from the fact that, in almost every succeeding year, new students of Vico have appeared, we may reasonably believe that his fame is not dead nor even diminished, but that the poor Neapolitan professor, whom a contemporary satirist pictured,

> Stralunato e smunto
> colla ferola in mano,

has survived failure and at last come by his own.

[1] *Revue Philosophique*, 1888, xxv.

We have now described in their broad outlines the age in which Vico lived and the vicissitudes of his life and writings. It remains to give a brief account of his opinions, to point out their value, and so to place ourselves in a position from which we may judge of his comparative worth.

The earliest of Vico's philosophical writings are, as has been said, his Academic speeches. He did not himself attach any permanent value to them, and even regretted having published the only one which was printed before the nineteenth century. They have, however, considerable interest both as furnishing the earliest indications of his mature opinions, and because they show the methods of study which he advocated and, to a considerable extent, himself followed. The Orations are six in number, and are composed in a clear style. The first deals with the importance of introspection. The Delphic inscription "γνωθ σεαυτοιν" is represented as the beginning of all wisdom. Self-knowledge leads to the knowledge of God. The dignity of human nature is shown by the fact that the heathen gods were personifications of human attributes. The proper study of mankind is man and by developing his mind he fulfils the fundamental law of his being and attunes himself to the Divine purposes. The struggle between the dictates of wisdom and man's perverse tendencies is dwelt on in the second Oration. The Divine Reason generates the world of realities, and by exercising his reason alone can man have knowledge of that world. Wisdom and virtue are in themselves identical.

In the third Oration the functions of literature are indicated and the enormity of their abuse insisted upon. The consciousness of ignorance is the mark of true learning. Vico teaches in the fourth and fifth Orations that an altruistic ideal should govern the pursuit of science, that the seeker after knowledge should emulate the Divine goodness in promoting the common welfare. He advances a remarkable argument to prove that war is connected with literary activity, and that both phenomena have, in fact, usually synchronised. This is the earliest of Vico's historical generalisations. The sixth and last Oration, published under the title *De ratione studiorum*, may be looked on as forming, in certain respects, an introduction to Vico's later works. As appears from the Autobiography, the attention of Vico was directed, on his return to Naples, to the Cartesian philosophy and to what he came to consider its fundamental error. Vico was unable to appreciate the causes which had brought the scholastic philosophy into disrepute. His education had kept him apart from the action of the forces that led the seventeenth century to embrace so readily the universal doubt of Descartes. To most of his contemporaries severance from the past and total rejection of its authority seemed the only rational means by which to emancipate the mind and initiate an acceptable system of thought: to Vico, steeped as he was in the wisdom of the ancients, and with his unqualified admiration for Roman Jurisprudence, Descartes' pretension seemed a mere madness, capable of causing, if accepted, irreparable loss. In the *De*

ratione studiorum, therefore, he proposes to discuss this fundamental question of method, and to show cause why the principles of the *Discours sur la méthode* should be repudiated in any sound system of education. He was aware of the service Descartes had rendered by asserting the importance of individual judgment (*vide* Answer to a criticism of his *De antiquissima sapientia*), but the assertion that to know Latin was to know no more than Cicero's servant seemed to one of Vico's temperament to betray a total lack of the historical sense. The discovery of the application of algebra to geometry might ultimately lead to that of the differential calculus, but even were Descartes able to construct the world out of motion and extension he could not reconstruct its wisdom, the accumulated product of ages. The attempt to confine instruction to the mathematical and kindred sciences, to dispense with the study of subjects in which merely moral certitude is attainable, cannot be justified, for it fails to take into account man's proper nature. Vico perceived the truth of the rule governing all modern education, which was afterwards more clearly enunciated by Pestalozzi, that the method and order of instruction should be adapted to the natural course of intellectual development. The early study of abstract science is wrong because it fails to call into play the powers that are strongest in childhood. Although Vico must have disapproved Bacon's scant respect for Aristotle and his doctrines, he was at one with him in insisting on the reform of scientific method, on the importance of observation and experiment in natural science, and he desired this oration to be regarded as the complement of the *De augmentis scientiarum*. The analytical method of study Vico maintains to be logically out of place when the mind has not been already stored with an adequate knowledge. Topic must precede criticism. The hope that the secrets of nature might be unlocked by the mathematical reasoning of the Cartesians had led to the abandonment of practical research. Ethics and politics had ceased to be seriously taught. These are merely examples of the evils which result from the employment of defective method. The argument then proceeds to seek confirmation from the history of Roman law, and the discussion is ended by an apology for the vastness of the subject undertaken. Rhetoric, in the true sense, is concerned with all wisdom.

The point of view of the writer of this discourse is, as has been seen, essentially that of a teacher. The difficulties Vico had encountered in pursuing his own studies had, no doubt, impressed on his mind the practical rather than the philosophic view of the importance of method. His criticism of Descartes is necessarily crude, because he was but ill acquainted with that philosopher's opinions, and appreciation of the immense importance of Descartes' mathematics could hardly be expected in a publicist who declared that he had not succeeded in crossing the *pons asinorum*. The *De ratione* is, however, notwithstanding its obvious limitations, based on sound educational principles. The broad grounds on which Cartesian

doubt is rejected are acceptable at the present day, and the necessity of providing an education before all things practical is one that has gained universal recognition. "Men must not be taught," said Vico, in one of his letters, "as if they were destined to enter a world composed of lines, numbers and algebraic symbols!" Such common-sense views were rare in the eighteenth century.

The prominence given in the *De ratione* to the study of jurisprudence is an indication of the importance Vico attached to it. The insight into the past which a knowledge of Roman law must bring with it, was, in his opinion, sure to create that sense of human solidarity which is of the essence of wisdom. Jurisprudence was, therefore, the most indispensable of studies; it was the foundation on which Vico subsequently reared the structure of historic criticism. Before dealing with Vico's works on jurisprudence it will be necessary to briefly refer to a book intended to form part of a philosophic treatise which Vico did not live to complete. The *De antiquissima italorum sapientia*, more usually known as the *Liber metaphysicus*, led to a long controversy immediately after its publication, and it constitutes in many respects a strange anomaly in the development of its author's mind. The science of language may be said not to have existed before the foundation of the Asiatic Society of Calcutta. The systematic study of all languages, with a view to ascertaining the rules that govern their formation and development, has been undertaken in times comparatively recent: the task would have been fruitless until a knowledge of Sanskrit made it possible to see the underlying unity of European languages. The immense strides that the new branch of knowledge has made since Sanskrit became part of university curricula render it difficult for us to appreciate the attempts made in previous times to deal with the phenomena of language. Vico proposed, in writing the *Liber metaphysicus*, to discover the principles of a primeval philosophy by studying the origins of Latin words. The belief in prehistoric wisdom was not a new one. From the Hebrew story of the Fall down to the belated lucubrations of Mr. Gladstone, there has been a steady flow of contributions to this attractive subject. Vico's attention was first drawn to it by the *De sapientia veterum* of Bacon. But the end he had in view was different, as it was from that of the *Cratylus* of Plato, from which he professed to draw much of his inspiration. The importance of etymological studies may have been brought home to Vico by his acquaintance with Roman law. The theory clung to for a thousand years, that the letter of the law must remain unimpaired, that the quasi-sacred structure of the Twelve Tables contained the whole law—*finis æqui iuris*—cannot have failed to impress on a mind, already imbued with veneration for the past, a keen sense of the wisdom of the ancient world. Worship of the past is a common creed among scholars. In thus founding a philosophy on the study of the past, Vico, no doubt, also sought to

find a solid ground on which to make a stand against the inroads of Cartesianism. To an adversary who could establish on an historical basis the whole of human knowledge, it were folly to oppose the all-sufficiency of individual experience. Although the entire fabric of the *De antiquissima sapientia* had to be definitely abandoned when Vico wrote the *New Science*, it may be useful to note a few of the main positions of the early work. The first and principal question which Vico proposed to solve was that of the origin and validity of knowledge. The Latins, according to Vico, held that that which is made is alone true. Complete truth resides only in the divine mind. God has made all things, and contains them in Himself; hence His mind has entire knowledge of them. The mind of men, on the other hand, is outside created things, and is therefore unable to attain to any knowledge of them beyond what is purely superficial. Divine knowledge may be compared to a solid figure, human knowledge to a plane. Adopting the principle that nothing is knowable of which the cause is unknown, Vico denies reality to human knowledge which is not confined to the products of the mind. The *verum* must always be the *factum*, and nothing more. Reality is for us confined to abstract truth, the generation of our own mind. The logical outcome of this position is complete surrender to the Cartesians. Man is the god of his mental world of abstractions; beyond that world all is darkness and unreality. From the "*cogito, ergo sum*" to the complete certitude of mathematical truth, a universe of form and number, these are man's domain, but with them it ends. This criterium of truth was too artificial to bear examination. The fact that an idea is generated in the mind affords guarantee that it has its counterpart in the outer world. Yet Vico was led to use his criterium as an argument against scepticism, and to urge that the mere comprehension of causes was sufficient to establish the existence of Deity. By asserting the claim of metaphysical truth to rank before that of mathematics, Vico virtually ceased to maintain the validity of the text. Metaphysic is not a knowledge of causes as such, and it is only by abandoning the notion that *notitia rerum per causas* is the only reliable truth, and by relying, like Fichte and Hegel, on an instinctive belief in the absolute, that the science of Being can be placed at the top of the scale of certitude.

The inconsequence of Vico's metaphysics was in great part due to the desultory character of his training, and to the fact that he was lacking in the clearness of mental analysis, without which metaphysics become a mere logomachy. His mind had not assimilated the store of notions he derived from Greek philosophy and from his immediate predecessors. To one not naturally moulded for such studies, confusion was the inevitable result. The doctrine of metaphysical points, erroneously attributed by Vico to Zeno of Citium, is treated in the *De Sapientia* in a characteristically confused and unsatisfactory manner. Against the Pythagorean view that everything must be reduced to a sum of points, Zeno the Eleatic had, by the argument

from dichotomy, established the mathematical view that a point is merely position without magnitude. If a line be composed of points we must be able to say how many points it contains, but we can always divide a line into halves so that if it be made up of points there will always be more than any given number. The argument was one of many advanced by Zeno to prove the unreality of matter and motion and the falsity of the pluralist theories of the Pythagoreans, and was intended to accredit the pure monism of Parmenides. It served the same end as the celebrated puzzle of Achilles and the tortoise. The metaphysical point was, therefore, according to Zeno, a mere figment of the mind, and Vico's belief that he had propounded the doctrine of points betrayed grave ignorance of Greek philosophy. The fact that the Scholastics had represented Zeno of Citium as teaching that matter was ultimately composed of points no doubt led to the belief of Vico that the Zeno of his imagination had solved the problem of "the one and the many" by means of the doctrine of points. The great question as to how the absolute is related to the relative, or in other words how God has produced nature, had tormented the Greek mind, and it was now to receive its final solution by aid of an old conception applied in the light of revelation. The points are, according to Vico, unmaterial—they belong to the intelligible world, they are without material attributes, they, like the monads of Leibnitz, produce extension without being themselves extended, they are the essences or *virtutes* from which all things proceed. These points emanating from the divinity are the *materia prima* of created things, the "form" of which is impressed on them by the Divine mind. Although Vico sometimes appears to regard the points as, like the substance of Spinoza, *ens per se existens*, he does not consistently do so, for he attempts to distinguish the divine substance from that of which the points are composed; whilst, in other passages, he appears to suggest that the points are in reality one and indivisible, and he even boldly lays down in his *Risposta* propositions which, literally read, involve complete pantheism. The evident dangers of heterodox views led Vico to make a declaration of his adherence to the tenets of the Church, but the natural trend of his metaphysical speculations was undoubtedly towards pantheism, and the tardy insertion of a saving clause merely serves to accentuate the difficulty. Some of the positions taken in the *De sapientia* are purely Cartesian—*e.g.* that nature abhors a vacuum; whilst, as we have seen, his metaphysics are strikingly similar to those of Leibnitz. The whole work teems with contradictions and confusions into which it is useless to enter, and nowhere has Vico attempted to furnish satisfactory evidence of his theories. So useless is his theory of points to serve as an explanation of the problem which he set himself, that he unconsciously drifts from it (as we have seen) towards pantheism. The *De sapientia* is undoubtedly the least original and the worst thought out of all the compositions of Vico. A striking testimony to this opinion is afforded by the fact

that Mamiani claimed Vico as a sensationalist, Rosmini held him to be an idealist, and in the opinion of Gioberti his doctrine tended toward realism.

We have now given a sufficient sketch of the earlier writings of Vico, and may proceed to a short exposition of his juristic and moral philosophy. Besides the fact that the legal side of the philosopher is of more direct interest, it should not be forgotten that his fame in wider fields of speculation is largely due to a profound study of Roman law, and to the broad grasp of the principles of historical development which a thorough acquaintance with both civil and canon law could alone enable him to attain to. The experience of Vico as a teacher and his ambition to obtain a chair of jurisprudence had probably some influence in determining the direction of his thought. In what appears to have been a purely fortuitous way, he came to read the *De iure belli et pacis* of Hugo Grotius. The book had been published in 1625, and had exercised a very profound influence in Europe. Gustavus Adolphus carried a copy with him in his campaigns, and so rapidly did the science created by Grotius assume importance that the Elector Palatine founded a professorship of International Law at Heidelberg within the lifetime of the Dutch jurist. Although the *De iure* was mainly practical in its aims, the fact that it presented a very broad and entirely novel view of a department of law unknown to the Roman world rendered it antecedently probable that the work would impress a speculative mind such as Vico's. It must undoubtedly have led him to enlarge his previous notions of the domain of law, and sharpened his perception of the principles which originate and govern the legislation of mankind. The conception that human nature is the mother of rights, *naturalis iuris mater quæ nos etiamsi re nulla indigeremus ad societatem mutuam appetendam ferret*—the belief in a common human nature governed by a social instinct, the οἰκείωσις of the Stoics—became a principle on which Vico built his philosophy of law and, eventually, his philosophy of history. True it is that, whilst expressing his indebtedness to Grotius, Vico thought he saw serious ground for criticising him. As his own mind began to perceive the true nature of the historical method, the accumulation of authorities and the display of erudition in the *De iure* seemed less and less philosophic. It became apparent to Vico that the natural development of law must be dealt with in a fundamentally different manner. It is of course true that much of the criticism directed by Vico against the great work of Grotius is beside the point. The supreme importance which Vico attached to the primary source of legal principles may explain, but cannot justify, the reproach that Grotius, by severing theology from law, cut the latter adrift from its vital principle and deprived it of the power of fructification. In the eyes of modern science, and even in those of later eighteenth-century writers, the treatment of law as a self-contained subject marked a distinct advance in that department, and might be regarded as a manifestation and necessary consequence of the new spirit which, in wider

fields of knowledge, had, since the seventeenth century, been substituting the idea of a natural order of things for the mediæval conception of Divine intervention. It seems equally futile to detract from the merits of Grotius on the ground that he was insufficiently acquainted with municipal law and its historical basis. The statement, were it true, would not seriously compromise the theses which Grotius intended to establish. The work of Grotius is undoubtedly open to censure, both in point of style and of the absolutist character of polity which he approved. The strange view of natural law which, distinguishing *ius naturale simpliciter* from that *pro certo rerum statu*, led to the admission of slavery and the savage usages of warfare such as that of poisoned weapons, as sanctioned by natural law, may well be considered a more solid ground for unfavourable comment. The confusion into which Grotius seems to have fallen in affiliating positive law to laws of nature from which at the same time it derives its legitimacy and with which it may nevertheless be in contradiction, leaves, also, ample room for objection. The explanation of the unsatisfactory character of Vico's criticism of Grotius may, perhaps, be found in the fact that the aims of the two writers had little in common, and that whilst the jural speculations of the one were directed towards the elaboration of a philosophico-historical theory, those of the other tended towards an end primarily practical, and probably gained in force in direct proportion to their severance from speculative topics.

The influence of Puffendorf and Gravina on Vico seems scarcely traceable, although the former is frequently cited by him in a somewhat vague way, as are also Hobbes and Selden. But if there be a direct precursor of Vico in the department of law, it is clearly to Grotius that the honour is due. He was, for Vico, *iurisconsultus generis humani.* Professor Flint has ingeniously attempted to show that the historical method applied by Vico to the study of law and, in the *Scienza Nuova*, to that of the social cosmos, were derived, although illogically, yet by a natural sequence, from the arbitrary criterium of certitude laid down in the *Liber metaphysicus.* The restriction of knowledge to the truths which the mind has itself produced, and the consequent necessity, if an almost entire scepticism was to be avoided, of admitting a further field of mental activity, to which he gave the name of consciousness, resulted in confusion; but it also led, in the view taken by Professor Flint, to the great idea of a development of human thought and of the evolution of the moral world. The wide regions of belief, in which the arbitrary rule of *verum* and *factum* had no application, were, by a great rational process, contemporaneous and conterminous with the advance of science, gradually to be incorporated in the dominions of real knowledge, where they would be subject to no shadow of doubt. This notion, propounded by Vico at the expense of strict logic, may well have been the nucleus from which his later speculations derived their earliest origin.

Vico's principal work on law is entitled *De uno universi Iuris principio et*

fine uno A glance at its plan is sufficient to show that, in form at least, it is dominated by distinctly theological notions. Accepting the definition of the *Institutes*, "*iurisprudentia est divinarum atque humanarum rerum notitia*," Vico divides his subjects into three parts: *i.e.* the study (1) of the origin, (2) of the course, (3) of the subsistence of jurisprudence, and undertakes to establish the three propositions:

Origine, omnes a Deo provenire;
Circulo, ad Deum redire omnes;
Constantia, in Deo omnes constare.

He appears to have believed that this distribution of the subject-matter by reference to a theological conception was an integral part of the system he taught, but it may safely be assumed that such is not the case, and that the scheme is but an instance of the author's tendency to subdivide in an arbitrary and needless manner. The clearness of the work is also marred by the enunciation of principles or disjointed lemmata, the presence of which renders the legal and moral principles treated of unnecessarily obscure. If these peculiarities be overlooked, the doctrine of Vico in the *De uno* may be more readily explained. The fundamental position may be expressed in the proposition that the science of law is based both on reason and on authority, or, in other words, on philosophy and history. Philosophy brings to light the laws to which human nature is subject, and accounts for the causes of events. History bears witness to events, teaches the order in which they succeed, and the circumstances in which they may be expected to recur. Universal jurisprudence is thus formed of three parts—"*coalescit expartibus tribus, philosophia, historia et quadam propria arte iuris ad facta accommodandi.*" A proof of the proposition is sought by Vico in the history of law in Greece and Rome. The principles of law had, among the Greeks, been of considerable importance in philosophical discussions. The branch of philosophy which politics treat of grew out of legal studies. It was intimately connected with ethics, and this again finds its principles in metaphysics, the fountain-head of pure wisdom—*hominis consummatrix.* Besides these teachers of law as an abstract science, there were, at Athens, a body of practitioners (πραγματικοι) who, confining their attention to pure practice, were acquainted only with recorded law and decided cases. The whole body of Attic law was familiar to them, but their knowledge was unreasoned and contemptible. The inevitable result of this separation of theory from practice was that law as an art, *iuris ars*, did not exist in Greece. The rational application of broad legal principles to the facts of particular cases was impossible alike both to the pure theorist and to the pragmatist. When the question at issue was mainly one of fact, it was argued according to the precepts of rhetoric; where one of law, the pleader, without regard to the righteousness of the cause, invoked indiscriminately the written law or the precepts of philosophy.

The Romans show us an entirely different state of things. The free

spirit of the people had engendered broad views and a love of their country which placed the public welfare before private interest. For the Roman, experience in a succession of responsible offices took the place of theoretical training; the worship of the gods that of metaphysic. The Patrician magistrate was, at once, legislator and jurisconsult. Schooled in civic wisdom, acquainted with the underlying reason for the law and accustomed to determine its application, the early citizen of the metropolis of law combined in himself the philosopher, the pragmatist and the Greek rhetorician. This state of things did not long endure. Before the first Punic war Tiberius Coruncanius began to give systematic legal instruction to the Patrician youth. His teaching marked the inception of Roman jurisprudence *doctrina propria Romanorum.* This early form of instruction, intended as a preparation for service in the magistrature, dealt with law from the political point of view (*ratio civilis*). It was not till the Empire had spread civilisation over the world, that law, tinged with humanitarianism, and by adopting the principles of equity, became truly *iusti atque iniusti scientia.* A third source of law, independent of history and pure philosophy, is to be found in the etymological study of legal terminology. The jurisconsult was, in Rome, the eminently wise man, familiar with all things, divine and human. For us, however, in the opinion of Vico, Roman law is not final—we are furnished with another guide in Reason. The idea of our power, our knowledge and our wishes (*Nosse, velle, posse*), guided by the light of revelation, affords us the principal means of attaining to universal justice. It is the human conscience, reflecting Divine light, that is represented in all legislation which really embodies the rules of immutable justice. In order to attain perfection the true jurisconsult must, therefore, keep before him the principles of philosophy as well as the positive law which they underlie, and he must, above all, strive, by a study of events and monuments, to discover the origin of legal principles and the manner in which the various ages have regarded them. This combined method is the true key to jurisprudence; it avoids the endless contradictions to which all other methods have led, and it alone affords a means of reconciling Christian precept with the systems of antiquity. Man is a fallen creature, he possesses in his degraded condition vestiges of the perfection which was his before the Fall. By striving to win back some of the good he has lost, and overcoming mere animal instincts, much may still be retrieved with the Divine assistance.

These semi-theological conceptions do not greatly influence the subsequent argument of the *De uno*, which proceeds in a singularly modern spirit.

The problem of the origin of society and social polity is to us less attractive than it was to writers of the seventeenth and eighteenth centuries. It was a prevalent belief among them that, should they succeed in discovering the origin of society, its formative influences and earliest tendencies,

that knowledge would be of the very greatest value, since it would enable them to lay down the rules of the science of government, and perhaps to predict the ultimate end to which mankind may aspire. Although we no longer believe that results so far-reaching can be thus obtained, and therefore attach far less importance to these studies, yet when we reflect that, with all our modern progress, our ideas on the origin of society are as dim and may turn out to possess no more finality than the theories of Hobbes or of Rousseau, it is natural that we should examine the earlier speculations and compare them, with interest, to our own.

The modern question as to whether society was first formed by voluntary aggregation of many families or by the natural expansion of one may be said to be the political aspect of the problem, as to what were the motives which actuated its members. To the latter Vico attempted to give the answer. Man in a state of isolation and ignorance suffers from a twofold need. On the one hand his feeble mind requires the support of those of his fellow-creatures in order to arrive by intercourse at some modicum of truth. On the other his fragile body cannot, alone, hope to struggle successfully against the blind forces of nature. The first of these requirements supplies the spiritual basis of society; the second its material foundation. If this supposition be sound, society may be defined as an exchange of utilities—*utilitatum communio*—mental and material, and the function of law will be to secure justice in such exchange. To the Roman precept *Bona fide agito* we may add as a necessary corollary *Ex vero vivito*. Society, aided by the legislator, aims thus at our perfection, moral and material, and it is necessarily governed in its aim by these two precepts. They are inseparably correlated; for who can be honest in his dealings if he be morally depraved, or morally honest if his acts be unjust? That reason alone bears out these principles is shown by their expression in the *præcepta iuris* of the *Institutes*. To attain to a complete justice, it is necessary, however, according to Vico, to superimpose on these purely rational rules the Christian law of charity—*in omnes hominis præ Deo charitatem*. To injure no one is not complete justice; its natural complement is service of our neighbour, in act and thought. To give our neighbour his due is but a partial fulfilment of the law, if that due does not comprise all things necessary for the perfection of his existence. These principles led Vico to enunciate two rules which may at first sight seem inadmissible. The first—*Lex summae necessitatis*—sanctions in case of urgent necessity an inherent right in every man to preserve his life by taking the property of another even against the will of the owner. By the second—*Lex innocuæ utilitatis*—every man has the right to use and even to abuse the property of another, if he profits by so doing and the owner thereby suffer no loss. As rules of everyday conduct these rights might no doubt be open to serious question. M. Franck[1] has pointed out that the second rule is inconsistent with

[1] *Journal des Savants*, mars et avril, 1861.

the current definition of ownership, and would in many cases imply the right to do violence to an owner's wishes. With regard to the first he objects that such a right would destroy the virtue of charitable acts, which would no longer be voluntary, and that no limit can be assigned to the necessity which would justify spoliation. Such objections lose force when it is remembered that Vico's object is to determine the conditions of a pure distributive justice, putting aside, for the purposes of his argument, all considerations of mere expediency or practicability. The conception of ownership we have formed is the result of a vast historical experience, and is, like all positive law, moulded by the exigencies of social life. It may not, therefore, perhaps be theoretically perfect. The Christian obligation of charity, again, is not dependent on charitable acts being unsanctioned by the law of the land, nor is it any ground against necessity as a justification for despoiling another of his property, to point out that the necessity may be hard to establish, as might be alleged against the justifiability of self-defence. From the eloquent judgment of Lord Coleridge in *R.* v. *Dudley* (L.R. 14 Q.B.D. 273), it appears that even the question whether necessity may justify the taking of another's life—his most precious possession—is one (at least morally speaking) not entirely removed from discussion.

Since the end of society is an exchange of utilities in a just proportion, and the function of law is to secure that this proportion be maintained, two broad divisions of legislation may be naturally distinguished. Equalising justice (*iustitia æquatrix*), comprising the law intended to maintain equality of rights between persons subject to the same duties, embraces the whole civil law. Distributive justice (*in distributionibus regnat*) determines the apportionment of rewards and punishments. It is grouped together as penal law, and its principles stated as follows. The sanction provided by nature for the safeguard of rights lies in the moral conscience and the pangs of remorse to which she has subjected their violator. Habitual depravity lessens, however, the acuteness of these pangs, and it is for the purpose of inflicting on the wrong-doer the necessary supplement of suffering that the legislator subjects him to bodily pain (*ipsis est ferme peccandi necessitas*). Other motives for punishment would degenerate to mere vengeance or tyranny. Keeping the basis of penalty before us, it becomes clear that the legislator would be unjustified in punishing acts which are harmful to the wrong-doer alone, the "reflective offences" of Bentham. Conscience is here a sufficient deterrent. He must likewise make his aim coincide with that of conscience, which is the amendment of the culprit, and where that amendment is hopeless his duty is confined to safeguarding society; he cannot gratify its desires of vengeance. "The least excess," says Bentham, "consecrated to the sole object of vengeance would be pure evil." The doctrine is as old as the *Gorgias* of Plato.

Civil law is, according to Vico, comprised in three divisions : "Dominium," or the right of dealing with things; "Libertas," that of living unimpeded; "Tutela," that of protecting oneself or one's interests. Of these rights the civil personality is composed, and they are each of them an essential part of it. If our existence be hindered we cannot enjoy ownership ; if we be deprived of our property our liberty is useless. If we be unable to protect our liberty and our property they are both of them equally illusory. The liberty of man is part of his constitution. The natural exercise of his faculties, his will and intelligence, or the moral instinct which tells him *recta agere est necesse, vivere non est necesse*, demands that he shall be free to act. The admission of liberty as an innate prerogative of man logically entails the recognition of property. The body is meant to obey the mind, for it cannot act alone ; and in the same way material things fall naturally under the dominion of reason, the supreme arbiter of things created. "Tutela," the right of protection, is equally well founded. The senses protect the body, reason protects the rashness of instinct, and the self-conscious soul guards her own sanctuary. The duty of positive civil law is to protect these three rights and to obviate their abuse. When we turn from theory to the world of history, we, in fact, find that the principles thus rationally deduced have been slowly evolved from age to age, and, under the pressure of outward circumstance, found expression in the existing social order. Where these principles have been misunderstood and a false growth has consequently taken place, the institutions evolved contain in themselves the germs of dissolution ; they must inevitably pass away.

It will be seen from the foregoing sketch of Vico's system of origins that the theory of the Social Compact is left entirely out of account. That theory, which, although its ultimate development in Spinoza and Rousseau was due largely to the desire to supply a theoretical apology for resistance to the abuse of power, was based in its origin on a political truism which Vico would doubtless not have hesitated to admit. That Society implies the consent of at least a majority of its members cannot be reasonably gainsaid. Aristotle's notion of the State as a "κοινωνία" implies his recognition of the fact, and it is equally involved in the transition from the *status ex lege* of the *De uno* or the *stato ferino* of the *Scienza Nuova* to the most rudimentary form of a common life. Vico, however, was not led astray, as were so many authors of the age, by the attractive simplicity of a theory which remained plausible only if all but one of the integrating influences to which primitive man was subject were overlooked. Whilst recognising the fact that the wish to form a community must be supposed present in the minds of its founders, however barbarous, he did not admit that such wish and consequent consent were the determining influences.

Man in his primeval condition was, according to Vico, far lower than

the angels; he bore a far closer likeness to the post-simian species of Darwin. The whole picture presented to us in the *De uno* and in the *Scienza Nuova* bears, in fact, a striking resemblance to that drawn by Huxley and the evolutionist school. The primitive family of Vico is, broadly speaking, the cyclopean family of modern sociology.

CRIMINAL APPEAL IN ENGLAND.

[*Contributed by* W. F. Craies, Esq.]

The introduction in the sessions of 1906 and 1907 of a Criminal Appeal Bill, and the prospect that the Bill of the present session will soon become law, naturally invite consideration of the existing provisions of the English Criminal Law with respect to the review of the decisions of Criminal Courts of first instance.

"**Appeal**": **Rehearing**.—At the outset it is necessary to point out that "appeal" in the modern sense is the creature of statute and that the Common Law has no knowledge of the term "appeal" in the sense in which it is now used. By appeal at Common Law was meant the process by which a person injured by a criminal act, or on his death his near kin, were entitled to bring the offender to justice. This kind of appeal was but a modification of the blood feud: its procedure was mediæval if not barbarous, and it was abolished in 1819 after long desuetude and inopportune revival.

In civil cases, since the Judicature Acts, appeal has acquired the meaning of "rehearing" of a case on the merits as to fact and law by a higher Court. In this sense it is derived from the modern Chancery practice.[1]

In only one class of criminal cases is the term "appeal" used in the sense of rehearing of the whole case before a higher tribunal, and in these cases the appeal is not from the verdict of a jury but from the decision of a smaller to that of a larger body of justices of the peace. In many cases in which summary jurisdiction is given to justices out of general or quarter sessions there is a right of appeal, always statutory, to the justices in general or quarter sessions, and the appeal is by way of absolute rehearing. The whole case is gone through *de novo* and the respondent is called on to prove his case by oral examination of witnesses as if there had been no hearing before the original tribunal. There is no exact parallel for the procedure in any form of appeal, even in civil cases, in the Supreme Court.

One of the first principles of the Common Law was that, in cases where the verdict of a jury was necessary, the Crown or the party must as regards the facts of the case stand or fall by the verdict: no rehearing of the case on the facts could take place before any Court. It is true that in civil cases a verdict could be challenged by writ of attaint directed against the jurors who

[1] The term "appeal" was also used with reference to Ecclesiastical Courts, and in particular of the appeals to Rome abolished at the Reformation.

returned the verdict; but this right never extended to a criminal case, and as regards civil actions received its quietus in *Bushel's case*,[1] and was finally abolished in 1825.

In criminal cases, by long-established practice, the only mode of determining guilt or innocence recognised by the Common Law has been the free and unconstrained confession of the accused on arraignment or the unanimous verdict of a jury of twelve men. So far as the facts of such a case are concerned the verdict of the jury has been judicially final on the question of guilt or innocence, and any attempt to retry the charge could be barred by pleas of *autrefois convict* or *autrefois acquit*.

Where the facts were clear but their legal effect doubtful, it was always open to the jury to state in the form of a special verdict[2] the facts as found by them and to refer to the Court the questions of law raised by the facts so found.

In modern times such special verdicts are very rare. The most recent instances are those of *R.* v. *Dudley*[3] on the question whether necessity excused the killing and eating of a human being, and *R.* v. *Staines* on an indictment for polluting the River Thames.[4] This form of procedure in no way conceded to the Courts any part of the power of the jury to find the facts or any right to rehear the evidence, but merely called on the judges to apply their judicial knowledge to specifically stated findings of fact.

The King's Bench: "Error."—The Court of King's Bench had, as to questions of law, large powers of controlling and supervising the acts of inferior Courts of criminal jurisdiction.

By the writs of *mandamus* and prohibition it dealt with cases of refusal to exercise a jurisdiction possessed or attempts to exceed such jurisdiction or to usurp a jurisdiction not possessed.

By the writ of *certiorari* it could bring indictments from inferior Courts before itself for the purpose of trial, and it could change the venue of the trial where passion or prejudice or other causes were found to exist militating against the prospects of fair trial in the proper district. But when the trial was completed by verdict, procedure by *certiorari* was inapplicable,[5] and the only modes of reviewing the correctness in law of the judgment of the Court of trial were by writ of error.

Before the Judicature Acts the remedy by writ of error applied to civil and criminal cases alike. As to civil cases it was by those acts abolished, but as to criminal cases it has continued, subject only to certain modifications (effected by those Acts and by the Crown Office Rules) as to the Courts to which it lies and the practice by which it is governed. The writ issues only

[1] 1670, 6 How St. Tr. 99; see 1 Stephen Hist. Cr. Law 306.
[2] The right to return such verdict is specially recognised in Fox's Libel Act.
[3] 14 Q.B.D. 273, 560.
[4] 4 *Times* L.R. 364; 52 J.P. 215; 60 L.T. N.S. 261.
[5] See Archbold, Cr. Pl. (23rd ed.) 129, 130.

in respect of convictions on indictment, coroner's inquisition, or information in the High Court, and does not issue without the previous consent of the Attorney-General expressed by his fiat,[1] and the Courts have no controlling influence over him to compel its issue. The procedure is therefore open to the objection that the right of a defendant to obtain a review is subject to the consent of an officer of the Crown, at whose suit he has been convicted. Under the present practice, error upon a judgment of a Court of assize,[2] the Central Criminal Court,[3] and any inferior Court of record having criminal jurisdiction, lies to the King's Bench Division.[4]

A writ of error upon a judgment of the King's Bench Division is returnable before the Court of Appeal.[5] This is the only case in which that Court has jurisdiction in a criminal cause or matter.[6] An appeal by petition lies to the House of Lords from the judgment of the Court of Appeal upon a writ of error.[7] This is the only case in which that House has appellate criminal jurisdiction as to England; and in one case only since 1875, that of the Tichborne claimant, has the House had to deal with an appeal on a writ of error.[8]

The fiat or consent of the Attorney-General is a condition precedent to proceedings in error in the Court of Appeal[9] or in the House of Lords on appeal therefrom.[10]

The right of the Superior Courts to review by writ of error criminal proceedings in a subordinate Court has always been strictly limited to substantial defects of law appearing on the face of the record[11] as returned to the Court in obedience to the writ, subject only to the right to augment the record, *i.e.* to insist on its being made complete if on its return there are signs of material omissions.

The procedure on a writ of error, even as modified by modern legislation and the Crown Office Rules, is technical and dilatory,[12] and is fettered at the outset by the antiquated restriction created by the need of a fiat from the Attorney-General.

The Crown Cases Act, 1848.—Since 1848, proceedings by writ of error in criminal cases have been rare, having for the most part been rendered unnecessary by the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), and by the power of amending or disregarding minor defects in indictments given in 1851 (14 & 15 Vict. c. 100).

[1] C.O.R. 1906, r. 174.

[2] *I.e.* a Court of assize, a Court of gaol delivery, or a Court of oyer and terminer: Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (4).

[3] As to the position of this Court see *R.* v. *Parke* (1903), 2 K.B. 432.

[4] C.O.R. 1906, r. 173.

[5] C.O.R. 1906, r. 197.

[6] 36 & 37 Vict. c. 66, s. 47.

[7] 39 & 40 Vict. c. 59, s. 3.

[8] *Castro* v. *R.* 1883, 6 App. Cas. 229.

[9] C.O.R. 1906, r. 174.

[10] 39 & 40 Vict. c. 59, s. 10.

[11] Certain defects are under present practice treated as cured by verdict, and as to such defects a writ of error does not lie. See Archbold, Cr. Pl. (23rd ed.) 280.

[12] See *R.* v *Carlile*, 2 St. Tr. N.S. 618.

The justices in general or quarter sessions always had and often exercised the power of sending difficult cases for trial before the judges of assize ; and the Crown, as of right, and the defendant, in most cases, could transfer such cases to the Court of King's Bench (if the justices did not act *proprio motu*). When doubtful questions of law arose on circuit the commissioners, usually judges of the Superior Courts, adopted a practice of consulting all the Common Law judges after conviction. If the opinion of the majority of the consulted judges was against the validity or propriety in law of the conviction, the Crown exercised the prerogative of pardon in conformity with such opinion. This system saved many lives, but the informality and privacy of the proceedings of the consulted judges [1] and the inapplicability of the procedure to inferior Courts of criminal jurisdiction, which most needed correction on the law, led to the passing of the Act of 1848. That Act empowered all Courts sitting for the trial of indictments except the Superior Courts of Common Law and Commissioners of Assize,[2] to state cases on points of law arising in the trial of any indictment or coroner's inquisition. The defect of the enactment lay and lies in the absence of any right to have a case stated, a defect which has been corrected in many colonial transcripts of the statute.[3]

At one time, and even so recently as the Beck Commission Report, it would have seemed sufficient to give the same power to all Courts which try indictments to compel the statement of a case on conviction as exists in the case of convictions before a Court of summary jurisdiction.[4] Most of the trouble in the *Beck case* arose from the refusal of the primary judge to state a case under the Act of 1848.

The cases when stated are dealt with by what is in form a new Court, called the Court for Crown Cases Reserved, sitting in public and now consisting of five judges at least of the High Court. The Court has no power to deal with new evidence or to go behind the finding of the facts stated, save in so far as it can return the case for clearer and more adequate statement. And the Act is defective in that the power to state a case does not apply to points raised on the indictment before the accused has pleaded and the trial has begun, *e.g.* by a demurrer or by motion to quash the indictment, or on challenges to the array or polls of the jury. Such questions, fortunately rare in England, can still be dealt with only by writ of error. There is another serious defect in the procedure of the Court, now in practice to some extent corrected, that no adequate provision was made for securing that the cases reserved should be properly argued.

[1] Their opinions are included in regular series of reports, such as Leach, Russell & Ryan, Moody, and Denison.

[2] Sitting in the Civil Court on circuit.

[3] *E.g.* Canada, New South Wales, and New Zealand.

[4] Under the Summary Jurisdiction Acts of 1857 (20 & 21 Vict. c. 43) and 1879 (2 & 43 Vict. c. 49, s. 31).

Under the Judicature Acts.—The Judicature Acts have left the process of review in criminal cases virtually untouched, merely adapting the constitution of the Court for Crown Cases Reserved to fit in with the changes consequent on the creation of the High Court of Justice (36 & 37 Vict. c. 66, s. 47; 44 & 45 Vict. c. 68, s. 15). The creation of a Court of Appeal and the establishment of a system of appeal by rehearing in civil cases did not affect any criminal cause or matter; and the present Court of Appeal is specifically deprived of criminal jurisdiction except when it sits as the successor of the old Exchequer Chamber to deal with a writ of error on a judgment of the King's Bench Division in a criminal case, and even in the exercise of this jurisdiction it may not deal with questions which have been reserved under the Act of 1848 (36 & 37 Vict. c. 73, s. 47).

New Trials.—Even on the merger of all the Superior Courts of Common Law with those of Chancery, Probate, Divorce, and Admiralty into a single Court subject to review by a single Court of Appeal, there still remained a difference—an essential difference—in procedure in dealing with appeals from a judge alone and appeals from a judge sitting with a jury.

Where the verdict of a jury in a civil case is challenged the most that can be obtained is a new trial, unless it is clear that there was no evidence upon which the jury could lawfully find as they did, or material justifying the entry of judgment for the appellant *non obstante veredicto*; and the appeal, even under modern practice, is not in the full sense a rehearing as it may be when the decision of a judge alone is challenged.

There has been manifested from time to time in the Court of Appeal a tendency to vary the standard by which the verdict of a jury should be tested; but according to the decisions of highest authority a verdict should not be disturbed unless it is one which, viewing the whole evidence, must be regarded as improper and perverse.[1]

Until 1890 the old practice of the Common Law Courts was retained whereby the motion for a new trial was made to the Queen's Bench Division of which the trial judge was usually a member. In that year it was enacted that applications for a new trial in a civil case should be made direct to the Court of Appeal. But here again the lawgiver stopped short of interference with criminal cases tried in the High Court.

As regards such cases there had grown up before the Judicature Acts a limited power of interfering with the verdicts of juries. The practice of granting new trials in civil causes is usually traced to the latter half of the seventeenth century. This practice was extended to certain criminal cases, but only to a very small extent. One strong reason for this lay in the fact that very few indictments were tried before the Superior Courts of Common Law, and that the vast majority were dealt with by

[1] *Kleinwort* v. *Dunlop Rubber Co.*, H.L. July 16, 1907, Loreburn L.C.

commissioners of oyer and terminer or of gaol delivery or of the peace, whereas civil causes were tried by single judges of the Superior Courts (as commissioners of assize or at *nisi prius*) upon a record of a superior Court with power to refer the cause to the full Court for judgment.

Where an indictment was tried before the Court of King's Bench, or after removal into that Court by *certiorari* was tried before a commissioner of assize, the practice of allowing applications for new trials was extended to the verdicts given on such indictments, if the offence charged was a misdemeanour, the Court of King's Bench not distinguishing between offences of this kind and torts against individuals. One distinction however was made, viz. that applications for a new trial were entertained only on behalf of a convicted defendant, and neither the Crown nor a private prosecutor was allowed to challenge a verdict of acquittal, whereas in a civil case, either party could challenge the proceedings at the trial. Applications for a new trial have never been entertained in cases of high treason. For a time it was supposed, on the authority of *R.* v. *Scaife*,[1] that a new trial could be granted on a conviction of felony tried on a record of the Court of King's Bench. That case has not been overruled by any decision directly binding on the English Courts, but conflicts with *R.* v. *Mawbey*,[2] and has been rejected as erroneous by the Judicial Committee in two cases, raising the same question, which came from New South Wales.[3] If good law, *R.* v. *Scaife* applies only to the rare instances in which what is called a *venire de novo*, as distinct from a new trial, is ordered because of some defect in the proceedings at the first trial, on a point not affecting the merits, but amounting to a mistrial. This remedy has rarely been awarded except by way of judgment on a writ of error.

Where a new trial could be granted in a criminal case the grounds on which it could be ordered were the same in all respects as in a civil action in the Court of King's Bench. And the practice was left absolutely unaltered by the Judicature Acts of 1873 and 1875, and the Act of 1890 left the Queen's Bench Division as the only Court which could grant new trials in such cases. It is true that a question has been mooted whether the incorporation in the High Court of Courts of oyer and terminer and gaol delivery, including the Central Criminal Court,[4] has had the effect of applying to misdemeanours, tried in those Courts, the rules as to new trials applicable to such offences when tried on a record of the King's Bench Division. This moot point has never been solved by judicial decision and the knot will be cut by the Criminal Appeal Bill of 1907.

From this review of past and present practice it will be seen that throughout

[1] (1852) 18 Q.B. 773.

[2] (1796) 6 T.R. 619, 638; 3 R.R.R. 282.

[3] *R.* v. *Bertrand* (1867), L.R. P.C. 520; *R.* v. *Murphy* (1869), L.R. 2 P.C. 535; cf. *Re Edalji Byramjee*, 5 Moore P.C. 276; 13 Eng. Rep. 496.

[4] See *R.* v. *Dudley*, 14 Q.B.D. 273, 460; *R.* v. *Parke* (1906), 2 K.B. 432; *R.* v. *Davies* (1906), 1 K.B. 32.

the history of English law the supremacy of the jury in cases of acquittal has been uniformly recognised[1] and the right to review a verdict of guilty has been limited to cases where the indictment was bad in law or the law wrongly stated to the jury or inadmissible evidence admitted, or the verdict given absolutely without any legal evidence. Very rarely, if ever, has a conviction by a jury been upset on the ground that it is against the weight of the evidence,[2] and at no time has there been any power to enter judgment for the defendant upon any view of the weight of the evidence for or against him.

Having now stated the existing English law it may be well, before passing to the proposals of the Bill, to examine shortly the procedure of certain British possessions.

Appeals in British Possessions: India.—Under the Indian Criminal Procedure Code of 1898 enormous facilities for appeal and revision of sentences are given. The system is wholly different from that of England. Most Indian criminal cases are tried without a jury, and appeals lie both from convictions and from acquittals,[3] and on matter of fact as well as on matter of law, except in the case of trial by jury, when the appeal lies on matter of law only.[4] The provisions as to appeal are subject to a power of certain magistrates to refer questions of law to the High Court of their province or presidency,[5] and of the High Court and certain other Courts to call for and revise the proceedings of subordinate tribunals without any obligation to hear the parties or their lawyers.[6]

—— **Canada.**—The law of Canada as to appeals in criminal cases is contained in ss. 742-51 of the Criminal Code of 1892, which applies to all the provinces and territories of the Dominion.

Writs of error are abolished and the English procedure by case reserved is adopted (s. 743); but where a case is refused an appeal lies by leave of the Attorney-General, and on the grant of such leave a case is stated by the trial judge (s. 744). Applications for a new trial are permitted by leave of the Court of trial on the ground that the verdict was against the weight of the evidence (s. 747), or a new trial may be ordered by the Minister of Justice on an application for the mercy of the Crown on behalf of any person convicted of an indictable offence (s. 748).

The appellate Court, even on a case reserved, may direct a new trial, and has exercised the power where the trial judge has contravened the Canada

[1] The only and probative exceptions are the few cases in which the Crown on writ of error could obtain a *venire de novo* after a judgment of acquittal, *e.g.* where demurrer to the indictment had been improperly allowed or a valid indictment had been wrongly quashed, and the Court is naturally averse to interference, having before it only the "dead body of the evidence without its spirit, which is supplied when given openly and orally by the ear and eye of those who received it."

[2] *R.* v. *Stytche* 1901, 20 N.Z.L.R. 744 746, Stout C.J.

[3] S. 417.

[4] S. 418: law includes severity of sentence.

[5] S. 423.

[6] SS. 435-42.

Evidence Act, 1893, by commenting on the failure of the accused to give evidence on his own behalf.[1]

—— **Australia.**—In the Australian States the general rule is that the trial judge may of his own free will reserve a case for the Supreme Court, and must do so if requested before verdict by counsel for the defence[2] unless the question raised is frivolous or unsubstantial.

In Queensland and Western Australia, if judgment is arrested, the trial Court must reserve a case if so requested by counsel for the prosecution,[3] but apparently writs of error cannot be used nor new trials ordered except in the case of disagreement in the first jury, or on the consideration of a reserved case. In New South Wales the English practice as to writs of error and the grant of new trials for misdemeanour is preserved.[4]

Under the Commonwealth Judiciary Act, 1903, an appeal lies by special leave of the High Court of Australia from any judgment, final or interlocutory, in a criminal matter,[5] and the High Court seems to have power on such an appeal to grant a new trial.[6] This appellate criminal jurisdiction has thus far been very sparingly exercised and limited to points of great general importance which, if wrongly decided, might seriously interfere with the administration of criminal justice.[7] It can be exercised in favour of the Crown even when the State Court has quashed a conviction[8]; but the appeal is limited to questions raised in the proceedings before the Court appealed from.[9]

—— **New Zealand.**—In New Zealand the provisions as to reserving a case are substantially the same as those in Canada. Either party may ask for a case, and on refusal an appeal lies by leave of the Attorney-General, whether acquittal or conviction has taken place.[10] A new trial may be granted by the appellate Court on considering a case reserved[11] or on a special application on the ground that the conviction was against the weight of the evidence, or may be ordered by the Governor in Council.[12] Writs of error and the Common Law practice as to new trials appear to have been abolished.

United States.—In the United States the Federal Constitution and those of most States provide that no person shall be subject for the same offence to be twice put in jeopardy of life and limb. This provision is in substance

[1] *R.* v. *McGuire* (1904), 9 Canada Cr. Cas. 554; *R.* v. *King* (1905), 9 Canada Cr. Cas. 426.

[2] Queensland Code, 1899, s. 626; New South Wales Act No. 40 of 1900, ss. 428, 470; Western Australia Code, 1902, s. 667.

[3] Queensland Code, 1899, s. 672; Western Australia Code, 1902, s. 671.

[4] Act No. 40 of 1900, ss. 471, 474.

[5] Commonwealth Act, 1903, No. 6, s. 35.

[6] S. 36.

[7] *Millard* v. *R.* (1906), 3 Australian Commonwealth L.R. 827-8.

[8] *Attorney-General of New South Wales* v. *Jackson* (1906), 3 Australian Commonwealth L.R. 730, 735.

[9] *Millard* v. *R.* (1906), 3 Australian Commonwealth L.R. 827-8.

[10] New Zealand Code, 1893, ss. 412, 413.

[11] S. 415.

[12] S. 416.

the same as the Common Law rule, but is more rigidly applied in favour of the accused person. It has the effect of preventing the grant of a new trial in the case of an acquittal, where the accused has been in jeopardy. Writs of error are in full use, and the criminal jurisdiction of the Supreme Court of the United States appears to be exercised mainly if not solely by means of the Common Law writs of error,[1] *habeas corpus*,[2] and *certiorari*. But both in Federal and State Courts the general practice is to deny a writ of error to the prosecution except where a statute otherwise provides. Applications for new trials by persons convicted on indictment—whether for treason, felony, or misdemeanour—are freely entertained and profusely granted; but there has been no attempt to upset the supremacy of the jury as arbiter of the facts of a criminal case.[3]

It is impossible to discuss in detail the laws and the innumerable decisions of the Federal and State Courts with respect to the grounds for granting new trials in criminal cases. But the effect upon the administration of justice of the facilities accorded to accused persons for obtaining a new trial on technical grounds seems to have determined the draftsman of the Criminal Appeal Bill to avoid at all costs the granting of a new trial. In other words, the supremacy of the jury is to be abolished where it is most needed—in cases of crime; but retained where it is less needed—in a civil action.

The New Bill.—Having thus indicated the existing law and the British and American precedents available for consideration, let us now pass to the scheme of the Bill.

That scheme may be thus shortly summarised:

(1) To abolish writs of error and the jurisdiction and practice as to the grant of new trials by the King's Bench Division in any criminal case. In so doing it fails to provide for cases in which a question of law has been wrongly decided against the Crown.[4]

(2) To relegate certain classes of criminal cases to the status of civil proceedings, *viz.* indictments at Common Law for the obstruction or non-repair of a public highway or public bridge or navigable river. This merely carries out a change long obviously needed, and made as to evidence in 1877.

(3) To create a new and final Court of Criminal Appeal on the lines of the Court for Crown Cases Reserved. To this the only objection will be the likelihood of excessive pressure on the time of an undermanned Bench.

[1] See *Sanger* v. *U.S.* (1891), 144 U.S. 310.

[2] See *Ex parte Moran* (1906), 203 U.S. 96.

[3] The practice in the United States as to new trials seems to have been largely based on the old English procedure by bill of exceptions, which in England was not extended to criminal cases. See *R.* v. *Edmunds*, 1 St. Tr. N.S. 785.

[4] This defect is met in Australia and New Zealand; see *ante*, p. 100.

(4) To preserve the procedure for reserving Crown Cases and the relegation to the new Court of their decision. Apparently it is hoped that judges, by reserving cases, will stay the plague of appeals.

(5) To grant a right of appeal to the new Court on questions of fact or law or of mixed law and fact, in every case of conviction on indictment except as above stated and except as to indictments for treason or felony against persons having privilege of peerage, and to grant to the new Court as to such appeals a jurisdiction substantially identical with that possessed by the Civil Court of Appeal as to cases tried by a judge without a jury, *i.e.* power to go through all the evidence taken at the trial, to form their own opinion on it, and if they desire to take further evidence ; and to grant to the new Court also the power to give final judgment on the whole case as appears to them just, without regard to the original verdict and without the need of resubmitting the facts to a new jury.

This plan differs from the law now in force in England and throughout the Empire in absolutely depriving the appellate Court of power to order a new trial. The promoters of the Bill are no doubt actuated by mixed motives : desire to avoid the scandals attendant on the facilities for retrial in the United States and inclination to rely on the old maxim, " not twice in jeopardy," already quoted.

The provision as to appeals is coupled with a further provision.

(6) To empower the Court, on the request of the Home Secretary, to report on questions raised by petitions for exercise of the prerogative of mercy presented to the Crown by convicted persons.

The Proposed New Court.—The draftsman of the Bill, in combining the system of review by repeal and review on reference, indicates the weak point of the Bill. The new Court is to be on the one hand an ordinary Court of justice and on the other a sort of Judicial Committee to advise the Crown on petitions to admit appeals for clemency. In exercising the prerogative of mercy, the Crown may refuse to avail itself of the consequences of conviction by verdict, but where a Court of justice is called on to take up the position of the Crown on a criminal appeal, it is invited to depart from its proper sphere. Under the Bill it is empowered, nay required, to take upon itself the final appreciation of the facts of a criminal case upon a perusal of the shorthand notes taken at the trial, and upon evidence never submitted to a jury and which might produce upon that lay tribunal a very different impression from that produced on the judicial mind. Experience and the precedents already given point to the conclusion that, if criminal appeal in the modern sense is to be allowed, it would be better to allow it on precisely the same lines as in civil cases, *i.e.* substantially on

the grounds on which it is now allowed in criminal cases in the King's Bench Division, but subject to the rule, now applied in civil cases, that no new trial is to be ordered except for a substantial miscarriage of justice. Under the new Bill the judges will either be too shy of interfering with the jury, which will cause further appeals to the Home Office, or too ready to interfere, which will impair the position of the jury in criminal trials.

PRIMITIVE LAWS AND THEIR INVESTIGATION: A SUGGESTION.

[*Contributed by* Sir John Macdonell, C.B.]

Few things are more needed in the interests of comparative jurisprudence than a thorough and faithful account of customs and laws of primitive or undeveloped communities. Much excellent work has been done in almost every country where such are to be found. Science owes a debt of gratitude to certain missionaries who have sought to see things as they are without imparting their own ideas into their observations. The modern traveller is generally better equipped than his predecessor as an accurate collector of fact; he is probably forewarned against fallacies and delusions to which early travellers were exposed. There is more genuine curiosity, less dogmatism, more open-mindedness in a region in which the sciolist and the dogmatist have had too much their own way. The works of Post, Bastian, and Ratzel have raised the standard of accuracy. One great aid to the investigator is a *questionnaire* prepared by ethnologists and jurists, covering the whole field of native life; suggesting points which would not occur to every mind; and enabling the results collected by one observer to be compared with those obtained by another. Several such *questionnaires* have lately been prepared; one of the most carefully constructed is that elaborated by Dr. Max Beneke. We may mention another valuable guide in this field. In the course of the preparation of his great work on Roman Criminal Law, Mommsen deemed it necessary to procure information as to the criminal law of other civilised communities. He accordingly prepared "Fragen zur Strafrechtsvergleichung," which he circulated among experts, legal and philological. It was one of the last works in which he was engaged, and it did not see the light until his death in November 1903. The questions and answers have been edited and published by Dr. Karl Binding, and they are a valuable contribution to the solution of problems which require a wide survey and exact knowledge.

The most common defect of such interrogatories is their one-sided character: their authors have had in view particular forms of society, and the questions which they suggest are inapplicable to another social organisation.

In the latest number of the *Rivista Italiana di Sociologia* is a careful study by Signor Sarorgnan of the political and social constitution of the

Polynesian races. The writer brings out the feeble, imperfect character of their political organisation, the division of the population into two groups, severed by the law of taboo—the sacred (*moa*) and the profane (*noa*)—the trifling importance of the land, and the strange phenomena which are the result of a superabundance of population. It is obvious that a *questionnaire* applicable to a nomad tribe or to one with well-formed political institutions might not suit the purposes of the investigator into the condition of the oceanic races. Another common vice in investigations of this character is the "aloofness" of the inquirer; he sees the natives afar off and as in a picture. Herr Schillings, the African traveller, tells us how much he learned as to them when he, a solitary European, lived with them in camp.

We have received from M. Torday, a well-known African explorer, a copy of a *questionnaire* very carefully prepared by Mr. Read of the British Museum, with the collaboration of M. Torday and Mr. Joyce, secretary of the Anthropological Institute. We extract from it the queries which specially relate to the laws of primitive races, in the hope that they may be of use to some of our readers:

Trade.—(1) Do the people interchange any articles of produce or manufacture? (2) What trades are carried on by men and women respectively? (3) Do the people work as slaves for the chief, or sell their produce to him? (4) Do all labour irrespective of class or sex? (5) Is skill in handicraft respected, or is labour regarded as a degradation? (6) At what age do boys and girls begin to labour? (7) Is there any common place of trade for village, for tribe, for neighbouring tribes? Are the markets periodical? (8) Who attend the markets; is credit given? (9) In case of debt is war made, are goods of other traders or of the same nationality seized, or what? (10) When trading with a foreigner, how is a bargain concluded; is there a trading language? (11) How are middlemen paid?

Property.—(1) May all persons own (*a*) land; (*b*) slaves; (*c*) other personal property? If not, who? May women? Children? Joint ownership? (2) Who do in fact own land, slaves, etc.? How is title to land derived? (3) Does land ever revert to the chief? (4) Can land, slaves, etc., be sold? Exchanged? What conditions? Rented? (5) Can strangers hold land? (6) How are boundaries of land distinguished? Landmarks? Ceremonies, when set up? (7) Ownership of water? First-fruits? Game? Fish? (8) Is property lent? At interest? How recovered from borrower? (9) Rights of creditor over debtor? Can he sell him as a slave; his children; his relatives? (10) What happens if a debtor dies? Can creditor claim his body? Does person who buries dead take over debt? (11) Do owners of land own (*a*) crops; (*b*) trees, etc.

Inheritance.—(1) Who inherits the property of (*a*) the father; (*b*) the mother; (*c*) mother's brother? (2) If more than one, in what proportions? Failing the first heir, who follows? In what order? (3) Any special rules of inheritance for oldest or youngest? For sons as distinguished from daughters? For children as distinguished from sister's sons or daughters? (4) Does the widow inherit? What happens if widow re-marries? Or the widower? (5) Does an adopted child inherit? A blood-brother? Can slaves inherit? (6) Are the rules the same (*a*) for slaves; (*b*) landed property; (*c*) weapons; (*d*) other property? (7) Can property be left at will, or is inheritance fixed? Evasion of rules? (8) Has the chief a right to any of the property? (9) Is guardianship known?

Slavery.—(1) Are slaves kept; what is their proportion to the rest of the population? (2) How do individuals become slaves, by birth, capture, debt, crime, etc.? (3) Has the owner power of life and death? (4) What are their tasks; do they take part in war? (5) Can they marry; if so, in what class, and what is the position of their children? (6) Can they redeem themselves; if so, what position do they take? (7) Are they branded, marked, or distinguished by dress? (8) Can they possess property or slaves of their own? (9) Who is responsible for a debt incurred by a slave? (10) What becomes of a slave on death of owner?

Government.—(1) The title of the chief of a community; is he divine? (2) How appointed; is there any test of physical qualifications before or after accession? (3) If elected, by whom; what happens in case of dispute? (4) Is there any interim ruler or an interregnum; how long? (5) May women or minors succeed; who is the heir? (6) What is the extent of the chief's power; is he killed in case of misfortune (*e.g.* drought or famine); or after the lapse of a certain time? (7) Are taxes paid, or any tribute from a subject people? (8) Have petty chiefs independent jurisdiction; how are they appointed? (9) Are they accountable to the head chief or do they act as a check upon him? (10) Do they ever meet in council? (11) Is there a council of elders, warriors, people? Describe any ceremonies connected. (12) How are councillors or ministers appointed; what offices do they hold? (13) What is the revenue of the chief and officers? (14) Are their annual or more frequent feasts at the capital for payment of dues, etc.? (15) How are subject tribes ruled?

Justice.—(1) How is stolen property recovered; questions of inheritance decided? (2) Is blood revenge customary; in what cases; any right of retaliation for blood revenge? (3) Who are the avengers; on whom does the penalty fall; if on other than the offender, must he compensate family or village; does it fall on amimals? (4) Any composition (price of blood) or fine for offences; who pays; who receives; is acceptance optional? (5) Any right of asylum; at particular times; where; have priests or women special rights? (6) Is there a criminal law side by side with blood revenge; what punishments; can a substitute undergo punishment; can a fine be paid; who pays and who receives? (7) Has the chief a right to pardon? (8) Form of trial; who carries out sentence? (9) What constitutes (*a*) murder; (*b*) homicide, etc.; punishment for attempt at murder; homicide in self-defence? Distinguish kinds of crimes. (10) Are secret societies political bodies? (11) Right of appeal? (12) Is drunkenness, madness, etc., an excuse? (13) Are children punished; animals punished?

Crimes.—(1) Is homicide considered a crime; under what circumstances is it excusable? (2) Is there a distinction between accidental and wilful homicide? (3) Is suicide considered criminal or praiseworthy? (4) With regard to maiming, rape, abduction, seduction, abuse of children, assault, adultery; are these to be revenged by the party injured, or must he appeal to chief or others; are any regarded as mere venial offences? (5) How are treason, rebellion, and offences against the chief treated; is the dignity or person of the latter protected by any special sanction? (6) How are offences against priests or the ceremonies of religion treated.

Organisation.—(1) What relatives live in the same house? (2) How many huts are there in the average village? Are the villagers at peace with each other, united only against enemies, etc.? (3) Are villages banded together in groups? If not, what is the next unit above a village? Define carefully what you mean by sub-tribe, tribe, etc., or by any other terms. (4) What constitutes

membership of a tribe, etc.? Do inhabitants of a locality regard themselves as akin? (5) What is the relation of language and tribal limits? Or of the boundary of a chief's or king's power? (6) Give a list of tribes known to you, with a map, if possible. (7) Is there any other grouping besides that dependent on geographical nearness? Do blood relatives in different parts of the country feel that there is a tie between them? Any tie between people of same age (*i.e.* age-classes)? Of same occupation? (8) Does a man feel himself equally near to his mother's and his father's relatives? If not, to which? (9) Does he belong to one kin only, *i.e.* to a body of people who believe that they are related in virtue of descent reckoned through women only? or through men only?

Kinship.—(1) Give a genealogical tree, showing a man's lineal and collateral relations in ascending and descending direction. This can best be done by actually collecting genealogies, as many as possible, from the natives. These are of great value if complete, and should be sent with replies. After finding what relatives an individual has (both by blood and marriage), and entering them on the table, find out what term of relationship he applies to each, and enter it on the sheet under the name of the person. If possible, give clan names also, and district from which the persons mentioned came, where they reside, age. Give index numbers to each person and each table, and use in plan of village, etc. (2) Are terms of relationship used as terms of address? (3) Are special duties owed to or from persons standing in certain relationships? If so, what? (4) Are any relations avoided, *e.g.* sister, mother-in-law, their names not mentioned? (5) In speaking of relations, use the terms "mother's brother," "father's brother," in preference to uncle; mother's sister's son, mother's brother's son, etc., in preference to cousin, as uncle, aunt, cousin, brother-in-law, etc., are ambiguous. (6) If it is impossible to send genealogies, as directed above, give the native terms of relationship, with equivalents in English, as just directed. (7) If the relationship terms are not the same when used by women as when used by men, show wherein the difference consists. (8) Are genealogies kept? How far back can they go?

Marriage.—(1) What are the ceremonies; more than one mode of marriage? (2) How are wives purchased; all paid at once; service for wife; who receives payment? (3) Anything of the nature of wife capture, real or pretended? (4) Rights and duties of husband and wife? (5) More than one kind of marriage; on what does it depend? (6) Polygamy; frequent or not; on what does it depend; may a man have as many wives as he pleases? (7) Do the wives live together; have all equal rights? (8) Is concubinage found; temporary marriage; marriage of dead? (9) Is polyandry permitted if no child is born? (10) Whom may a man marry; from outside tribe? (11) Does the wife go to live with the husband, or *vice versâ*; any change at a later period? (12) Does a man have connection immediately after marriage; does he visit his wife by stealth only; does the wife return to her parents for a time? (13) Is stress laid on the virginity of a bride? (14) Any symbolic marriage; to tree; animal; woman; god? (15) Do they exchange wives; lend them; hire them out? (16) Child marriage; who chooses wife? (17) Who proposes marriage; is consent of woman needed? (18) What relatives may a man marry; may he marry his father's wives? (19) May a man divorce wife at will; or when; may a wife divorce husband at will; or when? (20) To whom do children belong? (21) Any marriage portion? (22) How about bride price or marriage portion if one spouse dies? (23) Has a man (*e.g.* of same age-class, *i.e.* of same age as

another) right of (*a*) occasional, (*b*) permanent access to the wives of class mates?

Family.—(1) Do children belong to the family of the father or the mother? Is a child legally of kin both to father and mother; if not, to which? (2) Does a father buy his children from the mother's family? (3) Does a child inherit from its father? From its mother's brother? (4) If the child belongs to the mother's family, does the father take any part in birth ceremonies? (5) Does the position of the children depend on the form of marriage? On the payment of the bride price? Or on any variable factor? (6) In case of polygamy, have all children equal rights? (7) In case of divorce or separation, what becomes of the children? (8) What rights has a father over his children? May he kill them? Sell them? (9) Is adoption practised? Blood or milk brotherhood? What ceremonies? What effect on blood feud, etc.? Is blood sisterhood known? (10) What is the position of the children (*a*) of a slave woman and free man? (*b*) Of a slave and a free woman? (*c*) Of two slaves belonging to different masters? (11) How long do children remain under authority of father? Can they leave father's house at will? When? What authority has head of family? (12) Are male and female children brought up together?

Widows.—(1) What becomes of a widow? Does she pass with other property? (2) Is widow sacrifice known? (3) May a widow marry again? If so, does she choose? (4) Do they inherit; if so, how much? (5) Ceremonies of mourning? Special dress or painting? How long? (6) How are posthumous children regarded? (7) Do widows return to their own families or districts? (8) Do they take (*a*) sons, (*b*) daughters with them?

Morals.—(1) What words are used to express right and wrong, virtuous and vicious? (2) What distinction is drawn between punishable crimes and wrong acts only to be visited by public reprobation? (3) What acts are considered wrong when done against a tribesman, but right when done against an alien? What duties are owed to tribesmen and not to others? (4) Are gods or spirits supposed to punish by afflicting the transgressor or his family? (5) Are the acts of a man supposed to affect the state of his soul before or after death? (6) Is hospitality towards tribesmen or all men a duty; is it wicked or mean to refuse it? What are the consequences? (7) Is cheating approved or condemned, in the case of a tribesman, of a stranger? (8) Is lying wrong in itself, or under particular circumstances or to particular persons? (9) Is the breaking of promises or oaths condemned? (10) Is adultery a personal injury or an offence against morals? (11) How does public opinion judge of unnatural acts? (12) How is cowardice regarded and punished?

Covenants, Oaths, and Ordeals.—(1) What forms of covenant are used, as in setting tribe-rights, making peace, etc.? (2) Do they appeal to any personal being to punish breaches of faith? (3) Is anything resembling an oath taken by an accuser, witness, etc.? Give words. (4) If so, is it accompanied by any symbolic act, and what is the explanation? (5) Is the blood of the parties mingled or drunk? (6) Is the blood-covenant regarded as a process of adoption into the community? (7) Is eating and drinking together of any particular food a form of covenant? (8) Are ordeals in use, as plunging in water, passing through fire, taking poison; if anything said, may a deputy be employed?

Taboo.—(1) Are certain kinds of food forbidden, though wholesome? To whom; individuals, family, tribe? Always, or at certain age, times of the year, etc.? Why? By priest's order? (2) Are prohibitions the same for male and female animals? For men and women; for warriors, old and young? (3) Any special

prohibition for hunters? Fishers? Kings? Priests? (4) What reasons do the natives give for any prohibitions? (5) Any prohibitions immediately before or after birth of child? Why? (6) May women eat with men? King with subjects, etc., or may they be seen eating? (7) Is person of king, chief, or priest sacred? Are they forbidden to do things permitted to others? (8) May name of dead be mentioned, and why not? Of mother-in-law? Of other relatives? (9) Any words or language specially sacred, and not to be used by all? (10) Any places not to be profaned? Who may not touch them? Men, women? (11) Punishment for violating prohibition? (12) Are taxes imposed arbitrarily? By whom? In what words?

In many respects from the point of view of the ethnologist Dr. Beneke's *questionnaire* is more satisfactory; it touches points of interest overlooked in the queries quoted above. To illustrate the thoroughness of the investigation which he proposes to carry out, we quote the list of questions relative to criminal law:

Strafrecht. — Wer verfolgt und bestraft? Kann der Stammeshäuptling— welcher sonstige höchste Inhaber der Strafgewalt—alle Delikte verfolgen? Oder nur bestimmte schwere, und welche? Wer verfolgt die leichteren?

Wird von Amtswegen vorgegangen? Oder ist ein Antrag des Verletzten erforderlich? Kann oder muss derselbe unter bestimmten Voraussetzungen durch einen solchen seiner Verwandten (welcher?) ersetzt werden?

Giebt es ein Begnadigungsrecht? Wem steht es zu? Wie wird es ausgeübt? Besonders häufig bei gewissen Klassen von Thätern? Bei gewissen Gelegenheiten?

Giebt es Asyle? Was gilt als Asyl? Schützt die Flucht ins Asyl nur bei fahrlässig begangenen Delikten? Wen schützt das Asyl nicht? Wie lange dauert das Asylrecht?

Giebt es eine Auslieferung gewisser — welcher? — Verbrecher an fremde Stämme? Wird sie durch Androhung von Krieg erzwungen?

Giebt es eine religiöse neben der weltlichen Sühne? Für welche Klassen von Thätern? Welche Thaten? Mit welcher Wirkung?

Hat der Verletzte oder seine Verwandten (welche?) das Recht — oder die Pflicht — sich an dem Missethäter, oder seiner Familie, bezw. seinen Stammesgenossen zu rächen?

In welchen Fällen findet Blutrache statt? Wer nimmt daran Teil? Welche Regeln sind massgebend?

Wodurch kann die Blutrache abgewandt werden? Ist sie gewohnheitsmässig durch ein Wergeld ablösbar? Wie hoch ist dasselbe? Giebt es Abstufungen nach Stand? Alter? Geschlecht? Welche? Wird es sofort bezahlt oder in Raten? ev. durch Abarbeitung? Muss Sicherheitsbestellung durch Bürgen oder Pfänder angenommen werden? Wem fällt das Wergeld zu? Ein Teil an den Richter? Welche Folgen hat die Nichtzahlung? Wer ist nächst dem Thäter zur Zahlung verpflichtet? Gilt der Satz Auge um Auge, Zahn um Zahn? Nur zwischen Angehörigen desselben Standes? Stammes?

Giebt es bestimmte Bussen für die Verletzung einzelner Glieder etc.? Wie hoch sind dieselben? Sind sie nach Stand, Alter, Geschlecht abgestuft? Wie?

Welche nach europäischen Begriffen strafbaren Handlungen sind nach den Anschauungen der Eingeborenen erlaubt *α* gegen Stammesgenossen? *β* Angehörige fremder Stämme? *γ* Europäer?

Welche Vorschriften giebt es über?

Mord und Totschlag? Welcher Unterschied wird zwischen beiden gemacht?

Körperverletzung? Misshandlung von Sklaven? Thierquälerei?

Ehebruch? Darf der Ehemann den auf frischer That ertappten Ehebrecher töten? Die Frau?

Notzucht? Missbrauch weiblicher geschlechtlich unreifer Personen?

Beleidigung?

Raub?

Diebstahl? insbesondere heiliger Gegenstände? zur Nachtzeit?

Betrug?

Fälschung von Waaren und Tauschmitteln?

Zauberei?

Meineid?

Urkundenfälschung?

Grenzsteinverrückung?

Landesverrat?

Landfriedensbruch?

Marktfriedensbruch?

Die Übertretung der Speiserverbote? Welche giebt es? Insbesondere für die Schützlinge bestimmter Gottheiten?

Ist der Genuss — der Verkauf — berauschender Getränke verboten oder irgend wie beschränkt? Welche sind bekannt? Sind einige erst in historischer Zeit eingeführt? Wird Menschenfleisch genossen? Heimlich? Steht Strafe darauf?

Wird das Gehen ohne Bekleidung oder Bemalung — in Gegenwart von Stammesfremden — bestraft? oder umgekehrt in gewissen Fällen das Bekleidetgehen?

Wird das unerlaubte Waffentragen bestraft? Wem ist es verboten?

Wann bleiben obige Delikte straflos?

Wie wird bestraft der Versuch eines Deliktes? Tritt Straflosigkeit bei sog. thätiger Reue ein? Die Beihülfe zu einem Delikt?

Welche Strafminderung tritt ein bei fahrlässig begangener Strafthat?

Tritt Straffreiheit ein im Falle der Notwehr? Des Nothstandes?

Ist ein Loskauf zulässig? Ist die Strafe an einem Stellvertreter vollstreckbar? Unter welchen Voraussetzungen?

Welche Körperstrafen giebt es? Sind sie auch an Frauen, insbesondere schwangeren, vollstreckbar? Wie erfolgt die Hinrichtung? Durch wen wird die Körperstrafe vollstreckt?

Für welche Delikte giebt es Vermögensstrafen? Wie hoch sind diese in den einzelnen Fällen? An wen fallen sie? Ist die Konfiskation des ganzen Vermögens bekannt?

Giebt es die Strafe der Verbannung? Der Friedlosigkeit? ev. unter welchen Voraussetzungen und mit welchen Folgen?

Giebt es Ehrenstrafen? Auf Zeit? Dauernd? Auch nach dem Tode an der Leiche vollstreckbar?

Welche Freiheitsstrafen sind üblich? Wer beköstigt die Gefangenen? Giebt es verschiedene Arten derselben? Wie werden die Gefangenen beschäftigt? Wem fällt der Arbeitsverdienst zu?

Welche religiösen Strafen sind bekannt? Insbesondere welche Folgen hat die Berührung unreiner Gegenstände? Welche gelten als unrein? Die Berührung heiliger Gegenstände, und welche sind dies?

Findet ein Strafverfahren gegen Thiere statt? Gegen welche? Unter welchen Voraussetzungen?

Either *questionnaire* will be of great use to investigators; and we are not without hope—and it is the main purpose of these remarks to give expression to the hope—that there will be one day carried out a thorough ethnological survey of the primitive communities within the Empire—a survey conducted independently but on similar lines and with the aid of a well-constructed *questionnaire*. No task would be more deserving of the attention and concerted action of the many societies now doing good work in this field. If the preparation of a *Corpus Inscriptionum Latinarum* or *Græcarum* is worthy of the united efforts of scholars, can less be said of the collection of customs older than any inscriptions? As to both kinds of work, delay is mischievous, sometimes fatal: inscriptions are effaced or blurred, but not less so than primitive habits and ancient laws not committed to writing. If it is right to take measures to preserve the fauna of Africa, threatened with extirpation, is it not important to save the fast-perishing records, the oldest muniments of the race, it may be, of archaic usages? Ten or twenty years hence it may be impossible as to many communities to distinguish the primitive elements from those which have filtered into them by reason of their contact with civilisation. Should any of our readers desire to give effect to the proposal which is here made—the preparation of an ethnological atlas or *corpus* of the primitive laws and customs found within the British Empire—the Journal will give them what aid it can.

BILLS OF EXCHANGE AND INTERNATIONAL CODIFICATION.

[*Contributed by* W. J. Barnard Byles, Esq.]

The Various Attempts at Codification.—The preparation of an international bill of exchange code has long been a favourite occupation with international legal congresses. The reason therefor is not hard to seek. On the one hand the practical advantage of having a general law dealing with instruments so essentially international in their employment as bills of exchange is obvious, while on the other the question appears at first sight to be much simpler of solution than has evidently proved to be the case in actual practice. The appendix to a recently published pamphlet,[1] the work of Dr. Meyer of the Prussian Court of Appeal, has, probably for the first time, collected together in a convenient form for comparison the actual text of four at least of these draft codes. The four codes dealt with are the so-called Bremen rules ("Bremer Regeln") dating from about 1875, the code prepared by the Institut de Droit International dating from about 1882, the code agreed on by the International Congress of Antwerp in 1885, and lastly the code which was the work of the Congress of Brussels of 1888. Dr. Meyer indeed continually refers in the course of his pamphlet to a fifth code—the Dutch draft code prepared as long ago as 1886. The actual draft of this code, which has never yet become law, is however omitted; moreover, it is in no sense apparently a code which is the work of an international congress, so that the reason for its inclusion with the other drafts is scarcely obvious. To the practice of compiling these draft codes at international congresses a halt seems to have been called since 1888, though the question of an international bill of exchange law has in fact been discussed at later congresses, for instance at a congress held in Paris at the time of the International Exhibition of 1900, and at a congress held at the time of the Exhibition at Liège in 1905. In neither of these later cases, however, does there appear to have been any attempt made to draw up a draft code. Of the four codes above mentioned Dr. Meyer evidently regards the Bremen rules as the most worthy of consideration, for he takes their provisions seriatim as the basis of his criticism

[1] *Loi universelle sur le change: Des différentes législations qui régissent actuellement les effets de commerce, et de leur unification.* Mémoire présenté à la demande des Doyens des commerçants de Berlin par le Dr. Félix Meyer, Conseiller à la Cour d'Appel de Berlin. (Berlin: Julius Springer, éditeur. 1906.)

of the subject. The origin of these somewhat oddly named provisions is rather obscure. They are said to be the work of the International Law Association, and are indeed printed in English in the appendix to Dr. Meyer's work. That they otherwise bear much trace of their English origin it would be hard to say. It might be more accurate to describe them as an attempt to effect a compromise between English and German law with, however, a distinct bias in favour of German principles. A fully developed code they do not pretend to be, since they consist of altogether but twenty-seven sections, the majority of remarkable terseness. None of these draft codes can certainly be accused of dealing with the matter at overdue length. The longest of them, the code prepared by the Institut de Droit International, contains a hundred and six articles, while the Antwerp and Brussels codes sum up the matter in fifty-seven and sixty-eight articles respectively. Inasmuch as the average length of a modern working code may be said to amount to about a hundred sections or articles, the exact length of both the English and German codes, the obvious objection to both the Antwerp and Brussels drafts is that they attempt to deal with the matter with a brevity which in actual practice, as exemplified both in England and Germany, has not yet been found possible. While the Bremen rules are clearly intended only to summarise the main points as regards which any international law must contain definite provisions, if it is ever to receive international approval, there is certainly no evidence that the Antwerp and Brussels drafts are framed on such modest lines. They are undoubtedly drafted as fully developed working models of an international code, except in respect to some minor points which are left to local regulation.

Predominance of German Principles at the Present Day.—Bills of exchange, as distinguished from cheques, are notoriously not of British origin, though the date of their first employment in this country may be hard to state. It is therefore at the outset difficult for English law to claim any original rights as regards these instruments, however great the use of them in the country may be. It should also not be forgotten that English law has been handicapped in the race for pre-eminence from the fact that it was not till 1882 that our law first assumed a form which the foreign legislator could take as a model should he be minded to do so. That a foreign jurist, previous to 1882, should have attempted to evolve for purposes of comparison from the, to him, exasperatingly perplexing realm of English case law, an idea of the leading features of our law, was scarcely to be expected. Both France and Germany have had a long start in this respect, for the French code is the Code Napoléon of 1807, while the German Code dates from 1849. The start thereby gained has been of marked consequence. It is difficult to point to any modern foreign law which bears any real trace of being founded on the English model. Even those codes which have come into being since 1882—such codes for instance as those of Italy, Spain, Portugal, and Russia, whose framers therefore had an English code available

for comparative purposes—approximate far more closely to German than to English principles. Dr. Meyer divides modern exchange laws into four groups: the German, the French, the Anglo-American, and an intermediate group—intermediate, that is to say, between the French and German groups. He further classifies these groups, only, however, as regards European countries, according to their respective populations and superficial area. The classification according to superficial area may be a somewhat misleading one, since it must of necessity include large areas containing but a very limited population. The classification according to population affords, on the other hand, some interesting results, though scarcely of a satisfactory character from the English point of view. Thus we find the German group an easy first in the race for supremacy with a population of, in round numbers, two hundred and eighty millions, the French group next with sixty-seven millions, the English third with forty-three millions (not much more than a sixth of the German total), and the so-called intermediate group, which includes Belgium and Spain, last with twenty-five millions. These figures, as already mentioned, refer only to European countries. If to the English total be added the eighty odd million inhabitants of the United States, that brings the Anglo-American group well ahead of the French. Moreover, Dr. Meyer in no way includes the English colonies, who of course for the purpose should be included in the Anglo-American group. On the other hand, the Chilian and Mexican laws, neither of which are referred to by Dr. Meyer, should probably be included in the French group. Both these codes, it might be mentioned, retain the old French principle, abolished in France itself by the law of 1894, of the "remise de place en place" which requires a bill to be drawn in a different place from that in which it is payable. At the same time the German group might equally claim the inclusion of the Argentine law, even though it contains one essentially French principle, that which regards the drawing of a bill as an assignment of funds in favour of the holder. It may perhaps be contended that this grouping of laws is in many cases somewhat arbitrary and fine-drawn, but it probably constitutes as reasonably accurate a classification of the subject as can be devised. The general result is of course to prove the immense predominance of German principles, whose marked characteristic, as Dr. Meyer points out, is their excessive formalism. Not only is German law predominant at the present day, but it would appear to be continually increasing its influence, as witness the most recent, and certainly not the least important, of European exchange laws, the Russian exchange law of May 1902. Anglo-American law, though it cannot be regarded as stationary, has scarcely made any appreciable advance outside Anglo-Saxon countries, while French law would appear to be actually retrograding before the advance of German principles.

Some Possible Amendments in English Law.—That this predominance of German law constitutes, from the Anglo-Saxon point of view, a considerable difficulty in drafting any bill of exchange law for international use, can hardly

be gainsaid. Our law may not represent absolutely the last word on the subject, but it undoubtedly is the law best suited to the English trading community, evolved as it is from the actual practice of traders themselves, and not, as one has some suspicion is the case with German law, evolved from what is considered officially to be the proper practice for traders to adopt. It is difficult to point to more than three subjects as regards which English law may be considered to be at a disadvantage as compared with German and foreign law generally. These three are the retention of days of grace, the existence of the doctrine of reasonable time in reference to the presentment of bills payable at or a certain time after sight, and the absence of any means of guaranteeing payment of a bill equivalent to the "aval" of foreign law.

Days of Grace.—As regards the retention of days of grace, the position of England and her colonies is a very isolated one. The recent Russian exchange law of 1902 no longer allows them, and at the present day England is probably the only European country, at least of any note, that still retains the practice. Moreover, the American Negotiable Instruments Law, now in force in the large majority of the States of the Union, has abolished days of grace, so that even in the Anglo-American group of laws a divergence on this point is to be noted. Under the circumstances there would not appear to be much difficulty in this country renouncing the practice, as it can scarcely be considered in any higher light than an antiquated relic of a time when the means of communication were very different from what they are nowadays.

Reasonable Time.—No existing foreign law outside the Anglo-American group nor any of these draft codes will have anything to do with the doctrine of reasonable time. They probably regard it as a doctrine which is chiefly remarkable for the inappropriateness of its name, since its main feature is in practice its essentially indefinite and therefore, from the formal foreign point of view, its unreasonable character. If a code is to be clearly understandable of the ordinary business man, he ought to find therein, at least on all leading points, a definite provision to guide him. That the English code fails in this particular instance to lay down any clear rule for his guidance can hardly be disputed. In fact His Honour Judge Willis warns business men to have as little as possible to do with bills payable on demand, owing to the absence of any certain rule for their guidance on the question of the time for presentment (Willis, *Negotiable Securities*, p. 155). Foreign law always imposes a definite time limit in these cases, in so far as a definite limit is not fixed by the terms of the bill itself, a special proviso which may be inserted by the drawer, or in some cases, as in the German law, by an indorser. The time limit varies in different codes from two years to three months. Of the draft codes, the Antwerp draft proposes to distinguish in this respect between bills payable absolutely at sight, and bills payable a certain time after sight. As pointed out by

Dr. Meyer, such a distinction would only tend to promote confusion. If, for the reasons given by Judge Willis, bills payable on demand are to be avoided by business men, then the practical result is that a definite class of instruments must be considered, solely owing to the present indefinite provisions of English law, to be useless for business purposes. However in accord the doctrine of reasonable time may have been with the customs and habits of former generations of traders, it is difficult to see how it can continue to serve a useful part in these days of vastly increased international trade, trade too with countries the great majority of whom decline to recognise any such doctrine.

The "Aval."—The system of the "aval" affords a ready and effective way for guaranteeing payment of a bill by the acceptor. At present in this country any person who signs a bill otherwise than as drawer or acceptor incurs only, under s. 56 of the Act, the liabilities of an indorser. In other words the drawer of the bill has not to his hands any effective way of obtaining a guarantee on the bill itself that the acceptor will meet the bill at maturity. A mere indorsement under s. 56 is no good to him, since he cannot as drawer sue an indorser, and drawer he must in fact become in nine cases out of ten when he wishes to obtain payment by bill of the debt of his perhaps hitherto unknown customer. It is noteworthy that the American Negotiable Instruments Law, though containing a section very similar to s. 56 of the English law, adds a proviso thereto which allows in effect the so-called indorser to definitely state, presumably on the bill itself, the terms on which he is willing to be held liable. Thus in this case, as in the case of days of grace, the American code has not followed the example of the earlier English code. Foreign law generally allows the person giving the "aval" to enter into what stipulations he likes in regard to the liability he assumes, subject to the general principle that, except for any such stipulation, he is held to assume the same liability as the person for whom he gives the "aval." Thus, if that person be the acceptor, the drawer is enabled to treat the person giving the "aval" to all intents and purposes as the original acceptor of the bill should the actual acceptor fail to meet it at maturity. The draft codes, as distinguished from the working codes, are by no means in unison on the question how far an avalist may make special stipulations. The draft code of the Institut de Droit International impliedly declines to allow any such stipulations at all. Clearly if such stipulations are allowed they ought to appear on the bill itself, but the Antwerp draft code at any rate allows the "aval" to be written on a separate document. This code in fact follows the French law in this respect, while in Germany an "aval" must in practice be written on the bill, though the actual law is silent on the subject. Inasmuch as an indorser may, under the present English law, give a qualified indorsement, it would seem only equitable to allow a person giving an "aval" to qualify by express terms, as in American and foreign law generally, the liability he is willing

to assume. Whether an "aval" should be permitted for a part only of the sum stated in the bill, as is said to be the practice in Germany and Italy, may however be more questionable. Since an indorsement may not under English law be a partial one, it is difficult to see why an "aval" should be permitted for a part only of the sum due. It cannot of course be denied that these draft codes are scarcely in unison on this question of the "aval," but that fact can hardly be cited as an argument against the introduction into this country of a practice so universally adopted elsewhere, since after all the differences raised are but matters of detail.

Discrepancies between English and Foreign Law.—It has been sometimes stated that English law would have to give way on a few but minor points if an international exchange law were to become an established fact. That this is somewhat too general a statement a study of Dr. Meyer's pamphlet tends to show. It may be more or less true to say that English and German exchange law is more akin than is the English and French law, but there is still a gulf between the Anglo-American and German group of laws which cannot be ignored. Owing to the predominant influence of German principles at the present day, it is, moreover, unlikely that any great concessions will be made on the German part, at least in the immediate future. The Bremen rules do certainly suggest some modifications of German law in an Anglo-American direction, but these rules were first drawn up upwards of thirty years ago, and it is more than doubtful whether any of the exchange laws which have since come into being, founded as they are almost exclusively in their main features on the German model, have seen fit to adopt these suggestions except to a very limited extent.

The Question of Protest.—One of the most striking points on which German law, and indeed all foreign law outside the Anglo-American group, insists is the necessity for protest on dishonour of all bills, not only of foreign bills as in Anglo-American law. One cannot help suspecting that it is this very fact of insistence upon the necessity for protest which has tended to make German law the model of so many later codes. The majority of foreign countries are notoriously far more under bureaucratic control than is the case with our own country, and it is therefore all the more difficult to introduce laws which would tend to dispense with official supervision. Once introduce the English practice of confining protest to foreign bills only, and many notaries and other officials would find themselves in a state of Othello-like want of occupation. It is worth noticing in this connection that, with the possible exception of the Norwegian and Danish laws, no law outside the Anglo-American group appears to allow of the preparation of a protest without official assistance even in cases of an exceptional character. Dr. Meyer in criticising the Anglo-American system of notice lays much stress on what he terms its rigorous character, which, he appears to consider, makes it quite as onerous a burden as the system of protest. He apparently overlooks the

fact that the actual form of the notice is nowadays practically disregarded by our law, since, as has been pointed out (Chalmers, *Bills*, 6th ed. p. 161), there is no recorded case of a notice having been held bad on the ground of want of form since 1841. Moreover, our law, technically at any rate, does not even require the notice to be in writing, but personal communication may suffice. Such ideas must appear absolutely revolutionary from the German point of view, but Dr. Meyer frankly admits that nowadays there is a continuously growing feeling against the system of protest as enforced in Germany and elsewhere. A provisional project for the simplification of protest has in fact been drawn up by the German Ministry of Justice, while many pamphlets, including one bearing the alliterative title of *Ein Protest gegen den Wechselprotest*, have appeared on the subject. In France and also in Switzerland the question of the simplification, if not the actual abolition, of the system of protest has for some time past been periodically brought forward. The admittedly burdensome requirement of protest can in fact be dispensed with in many countries by express waiver. German law explicitly allows such waiver, and in practice appears to tolerate even a verbal waiver, or one written otherwise than on the bill itself (Ball, *Deutsche Wechselordnung*, p. 111); a somewhat startling contrast this to the rigid character of the provisions dealing with the actual protest! In France also waiver of protest is said to be allowed, though the actual law is silent on the subject. It would be interesting to know in what proportions, in the ordinary commercial practice of either the German Empire or France, bills in whose cases protest is waived stand to those bills where there is no such waiver, since, if the former class of bills are largely in excess of the latter—under the circumstances quite a conceivable condition of things—it is difficult to understand on what grounds the necessity for the protest of inland bills is based. Dr. Meyer, however, does not hesitate to state that the *consensus gentium* is in favour of the maintenance of the system of protest, at any rate in a modified form, and it is almost superfluous to add that none of these draft codes suggest its abolition. It is equally impossible to suppose that the English trading community would ever agree, as part of the price to be paid for the introduction of an international exchange law, to the imposition of the system of protest for inland bills. There seems at the same time no reason why the question should ever be left at all to the control of a general law. The question of how each country should regulate the procedure to be adopted on the dishonour of its inland bills might well be left to local regulation.

Limitation of Actions.—Another important point as regards which much discrepancy is to be noted between the Anglo-American and the German group is that relating to the limitation of actions upon bills. The foreigner may well be struck by the fact that the subject of limitation is absolutely ignored by the English code, though provisions on the

subject are almost invariably to be found in foreign codes. Such an omission is indeed a plain intimation that English law does not regard the liability arising on bills as in need of exceptional legislation in this connection. It is quite otherwise in foreign law. In German law a different period of limitation is enforced in the case of an acceptor from that in the case of a drawer or indorser. Thus the period in which an action may be brought against an acceptor is limited to three years, but in the case of a drawer or indorser it varies from three to eighteen months only. Granted that there may be some good reason for distinguishing between the case of an acceptor and that of other parties, though such reason is the reverse of obvious, it is difficult to understand why under any circumstances the difference in time should be so great between the two cases. Moreover, the subject is further complicated by the fact that the time of limitation as regards the drawer and indorser varies according to the exact geographical position of the place of payment of the bill, if the action be brought by the holder, or of the place of residence of the indorser if the action be brought by such indorser against a prior party. To say that provisions framed on these lines—and practically identical provisions are to be found in many codes—are somewhat complex and involved, is to express but a mild opinion on the matter. It is indeed quite refreshing to find the twenty-sixth Bremen rule dealing with this subject with a most commendable directness, inasmuch as it limits the right of action against any party liable on a bill, without distinguishing between such parties in any way, to a uniform period of eighteen months. This actual time is of course impracticably short. Dr. Meyer indeed suggests a period of two years. It should not, however, be forgotten that the present English period of six years is probably longer than that of any foreign law except in a few special cases, such for instance as the thirty years' prescription for non-commercial promissory notes in French law, and that therefore the English law might conceivably have to make some concession on this point in reference to an international law. The statement already made to the effect that in those cases where the Bremen rules appear to come into conflict with German principles, they have been ignored by the framers of the most recent codes, requires some qualification as regards the subject of prescription. Three codes, all of them subsequent in date to the Bremen rules—the Spanish code of 1885, the Portuguese of 1888, and the Mexican of 1889—do not distinguish in any way between the various parties on a bill, but, in agreement with the Bremen rule, enforce one uniform period of limitation. Two of the draft codes, those of Antwerp and Brussels, leave the period of prescription as regards actions against other than the principal debtor on the bill to be settled by each nation for itself. This seems to be simply running away from the difficulty. An international exchange code, if it is to be worthy of the name, must tackle this point, and indeed leave as few points as possible to be settled locally.

Unlike the question of protest for inland bills, the question of prescription appears to be singularly unsuitable for local regulation, since it would simply mean the continuation of that want of uniformity which it ought to be the object of a general exchange law to suppress as far as possible. The Antwerp code retains moreover the French system of the so-called reference to oath which requires a person against whom a statute-barred claim is brought, or his representatives, to state on oath that to the best of his or their belief there is nothing still owing on the claim. The basis of this procedure appears to be the idea that if the person against whom a statute-barred claim is brought wishes to avoid payment, he must at least commit perjury in order to obtain relief. In other words he will have, it is said, to pay his debt in the next world if he cannot be further troubled in the matter in this, since prosecutions for perjury are almost unknown in this connection, for the debtor invariably takes care to couch his denial in some evasive and non-committal form. What might be called the enrichment ("Bereicherung") clause of German law, which is adopted by the Brussels draft, though as regards the liability of the drawer only, is scarcely less objectionable. As far as certain parties are concerned (in German law the provision relates to the acceptor as well as to the drawer), their liability is still considered to continue though the claim against them be barred by lapse of time or other laches of the holder, if otherwise they would in fact benefit at such holder's cost. It is perhaps not altogether to be wondered at that Dr. Meyes ignores these suggested provisions entirely, since he must be well aware how hopeless it is to expect that such methods of procedure would ever be tolerated in England or America. As regards the general question of prescription, he expresses himself strongly in favour of a uniform period for all parties, and thereby impliedly condemns the German system as unsuitable for a general law. That the English trader would even tolerate the German principle of prescription with all its ramifications, any more than he would the enrichment clause, or the reference to oath, is scarcely conceivable. Having regard to the three codes already mentioned outside the Anglo-American group who have already ignored the German principle, it cannot be claimed for that principle that it possesses at the present time any decided predominance, and it appears more and more unlikely that its retention would really be insisted on, if the creation of a general exchange law were made dependent on its retention or rejection.

The Effect of non-Acceptance.—A further marked discrepancy between the Anglo-American group of laws and the French and German groups alike is in relation to the question of dishonour by non-acceptance. With but two exceptions no law outside the Anglo-American group treats the refusal to accept a bill as equivalent to the refusal to pay a bill. In fact, the refusal to accept a bill is not regarded as a dishonour of the bill in the Anglo-American sense of the term. The only result of refusal to accept

a bill is to entitle the holder to demand not payment but security of the drawer and other parties that the bill will be met at maturity. Some laws do, it is true, allow the drawer or an indorser, if they be desirous of so doing, to pay the amount of the bill and thus have done with the matter once and for all, though the holder can never compel them to take this course. German law, however, will not tolerate such a practice : the most it permits the party liable on the bill to do is to pay the amount of the bill into court, or into an institution authorised to receive such deposits, and that too at his own cost. The two exceptions to this otherwise universal rule are the Swedish law of 1880 and the Russian law of 1902. Both these laws, it ought to be mentioned, differ from the English law in one respect, for in the case of a bill dishonoured by non-acceptance they allow a rebate on the amount paid before maturity by the drawer or indorser —in Swedish law of 5 per cent., in Russian of 6 per cent. In this case also the Bremen rules may well have had some effect, for the framers of the Swedish law doubtless had their attention drawn to the thirteenth rule, which gives the holder an immediate right of action against the drawer and indorsers of a bill dishonoured by non-acceptance, for payment of the amount of the bill and expenses, less discount. Dr. Meyer goes so far as to state that the provision contained in the new Russian law was in fact framed on this rule, the Russian trading community having brought their influence to bear in this regard. This is certainly a somewhat striking tribute in favour of the Anglo-American principle, and may induce traders in other countries to press for a similar change in their law. Even in Germany an alteration of the law in this respect may well be within the bounds of possibility. German jurists indeed admit that the average commercial man infinitely prefers to pay and have done with the matter rather than to have to find security, while they equally allow that the principle of finding security is itself only too conducive to litigation of a peculiarly vexatious character. Moreover, it appears to be frankly recognised that there is no probability of Anglo-American law giving way on this point. Of the draft codes, the Antwerp code alone retains the principle of finding security—a principle which, however, it is pretty safe to prophesy will never find its way into any international code hereafter.

No Satisfactory International Code yet Drafted.—It would naturally be impossible to discuss in detail, within the limits of a single article, all the questions dealt with by Dr. Meyer. As has already been mentioned, he takes the Bremen rules as the basis of his pamphlet. These rules are twenty-seven in number, one of which is scarcely more than an interpretation clause. Roughly speaking, therefore, Dr. Meyer may be considered to be of opinion that the subjects on which an international code will have to be prepared to meet conflicting views are somewhere about twenty-six in number. This may perhaps be somewhat too modest an estimate, even allowing for the addition of a few questions dealt with by Dr. Meyer but ignored by the

Bremen rules. One authority enumerates about seventy-five disputed points. It is to be hoped that this estimate errs too far in the opposite direction, since any attempt at codification in face of such difficulties might well be considered foredoomed to failure. It is somewhat to be regretted that Dr. Meyer does not lay greater stress on the distinction involved between the formalism of German law and, from a German point of view, the laxer principles of Anglo-American law, for the whole question of an international exchange law appears to be dependent on this point. A study of these draft codes forces one to the conclusion that an international exchange law has yet to be drafted which can have any chance of universal acceptance. It is impossible to suggest for a moment that the trading community in England or America would agree to provisions such as are to be found in the code of the Institut de Droit International or in the Antwerp or Brussels codes. The two latter codes are alike too much permeated with Franco-Belgian principles to be accepted in Germany, let alone in England. Draft codes appear inevitably to assume a local colouring. This was certainly so in the case of the Antwerp code. At the conference which drew up this code sixty-seven delegates are said to have attended, of whom forty-one were of French or Belgian nationality (vide *Law Quarterly Review*, vol. ii. p. 300). The first seven or so articles of the draft code were debated at great length, and doubtless with considerable Gallic vivacity. The conference then seems to have become alarmed at the slow rate of progress, or possibly even were becoming weary of the subject, for the remaining articles were hurried through *en masse* with the aid of the Franco-Belgian majority, who were able to overrule any opinion adverse to their own views. It is obvious that a code drafted under such circumstances cannot be considered a very impartial production. For a draft code to have any real value it must be the outcome of a meeting of delegates convened on more proportionate lines than was the case in this instance at any rate.

Gradual Change Possible in Foreign Law.—Dr. Meyer refers to the hope, once so often given expression to, that the nineteenth century would not close without seeing a general exchange law an accomplished fact, but nevertheless he does not despair of eventual success. Dr. Meyer may be regarded, judging at least from the title of his pamphlet, as the spokesman of the trading community in his own country. There seems little doubt that the commercial classes both in Germany and other countries would welcome a general exchange law as the most practical method of abating, if not actually abolishing, the excessive formalism of most foreign law. The English trader labours under no such disadvantage, and can therefore regard the situation more or less with indifference. The process may require time, but it seems inevitable that sooner or later foreign exchange law, impelled thereto by the trader, will have to adopt many of those Anglo-American principles which it has hitherto somewhat ostentatiously ignored, and when that day comes it will be but an easy step to a general law. At

present such ideas are as yet but in the air; still, pamphlets such as Dr. Meyer's tend to show the existence of a spirit of discontent with the present order of things. The English trader has nothing to gain but everything to lose from any premature general codification. The English law might benefit considerably if some of the alterations or additions already referred to were adopted, but the benefit accruing from any changes of this sort would be more than counterbalanced if they were accompanied by the introduction of other provisions of too alien a character. The principle of *laisser-aller* may not be one involving high ideals, but there is much to be said for its practice in this case.

A GERMAN SYSTEM OF LEGAL AND ECONOMIC PHILOSOPHY.

[*Contributed by* L. Oppenheim, Esq., LL.D.]

Legal Philosophy in the Nineteenth Century.—The last half of the nineteenth century was not a favourable epoch to legal philosophy. The theory of the law of nature which for three hundred years dominated all legal minds was shaken to its roots by the "Historical School." This school established the belief that law was the outcome of natural growth and, like language, not dependent upon individual arbitrary will in its growth. The "Historical School" was therefore satisfied when it could trace back the existing law to its more remote origin. Those who asked for some general theory of law besides the history of legal institutions took refuge in jurisprudence, the philosophy of the positive law, or, as Holland puts it, the "grammar of the law." But the blank left by the downfall of the theory of the law of nature was neither filled up by the "Historical School" nor by jurisprudence. Some thought that ethnology could fill the gap, and others staked their hopes on the new science of sociology. And there is no doubt that these sciences have contributed an enormous amount of material to the explanation of the manifold problems of the development of law.

The Demand for an Idealistic Legal Philosophy.—But in spite of the labour of two generations of researchers in these and cognate fields, the deeper minds are not at rest. Just as mankind is no longer satisfied with the materialistic explanation which the natural sciences offer of the phenomena of the world, and with analytic and synthetic, or deductive and inductive, logic which the philosophy of experience offers as an explanation of the phenomena of mind, so many jurists are no longer satisfied with a mere analytic theory of legal institutions. What they want and ask for is something better than a mere description of the historic growth of legal ideas, and something deeper than a dry and sober explanation of legal conceptions, forms, and institutions. They are looking forward to a system of thought which takes up the results of legal, ethical, ethnological, and sociological researches, and unites them into such a theory of the law as at the same time satisfies the requirements of the lawyer, the statesman, the historian, and the philosopher.

That many who worked in the field of jurisprudence have aimed at this goal cannot be denied, but none of them has as yet reached it. Many jurists as well as philosophers are therefore convinced that jurisprudence, the philosophy of the positive law alone, can never reach the goal, and that it is necessary to build up a system of legal philosophy on the basis of the doctrines of idealistic philosophy.

That the nineteenth century closes with a renascence of idealistic philosophy is a fact which nobody can deny who gives his attention to the philosophic tendencies of the age. And it was to be expected that this tendency would sooner or later engage the minds of jurists, tempt them with the desire to build up a system of idealistic legal philosophy, and lead them to the endeavour to satisfy the demands of those who are asking for more than a mere analytic system of jurisprudence.

Berolzheimer's System of Legal Philosophy.—Germany, ever foremost in the field of philosophic idealism, has now produced such a system of legal philosophy,[1] to which I desire to draw the reader's attention. Its author is Dr. Berolzheimer of Munich, and it comprises not less than five volumes, of which the first appeared in 1904 and the last in 1907.

The first volume is introductory and bears the sub-title "Kritik des Erkenntnissinhalts." It contains a theory of knowledge, and attempts to construct the basis of an idealistic philosophy in general.

The second volume treats of the epochs of legal and economic philosophy ("Die Kulturstufen der Rechts- und Wirtschaftsphilosophie"). In this volume the author does not give a history of the systems of legal philosophy, but he attempts to bring into view the philosophical ideas underlying the successive legal and economic epochs of European civilisation. After an introduction dealing with the conception of legal philosophy, and giving a lengthy bibliography of systems as well of legal as of economic philosophy, this volume treats in seven chapters of the sources of the occidental civilisation, the old Greek state, the Roman world-empire, the Middle Ages, the emancipation of the middle classes, the emancipation of the lower classes, the sociological and cognate theories. The leading writers of every epoch are discussed and their doctrines explained.

The third volume bears the sub-title of the Philosophy of the State, and gives a system of political science.

The fourth volume, "Philosophie des Vermögens," treats of economic philosophy; and the fifth and concluding volume comprises a system of criminal philosophy.

Legal Philosophy and Philosophy in General.—I frankly admit that I do not belong to those who believe in such systems of legal philosophy as consider and treat the philosophy of the law as a part of philosophy in general. The uncertain basis of metaphysics, from which philosophy in

[1] Dr. jur. Fritz Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, 5 vols. (Munich: Beck, 1904–7).

general starts, the uncertain results to which it naturally leads, and the eternal strife between the different schools of philosophic thought make it undesirable to take the doctrines of an idealistic or of any other philosophy as the starting-point for a system of legal philosophy. I am convinced that it is possible to build up a system of jurisprudence or philosophy of the positive law which to a great extent avoids the controversies of philosophy in general, and satisfies the legitimate requirements of the lawyer, the statesman, the historian, and the philosopher without tying one down to the always controverted dogmas of this or that school of philosophic thought.

The Merits of Berolzheimer's System.—If I nevertheless draw the attention of the reader to Dr. Berolzheimer's system of legal and economic philosophy, I do so because such a system of the philosophy of the positive law as I have described and as is wanted might take almost every cornerstone from Dr. Berolzheimer's volumes. And apart from this, Dr. Berolzheimer's system is so full of interest and general merit that it ought to be studied by every jurist who takes an interest in the problems of jurisprudence. The mere fact that the second volume comprises a critical review of almost every[1] valuable philosophical conception of law that has made its appearance in Germany in the past and present leads one to consider this system as a standard work. Again the third volume, which propounds a philosophy of the state, and the fourth volume, which treats of economic philosophy, are full of inspiring thought whether or not the reader agrees with the author. Lastly, the system of criminal philosophy expounded in the fifth volume, although it is, according to my opinion, the weakest part of the book, will nevertheless fascinate the reader. Dr. Berolzheimer, who freely applies his critical knife to the systems of his predecessors, cannot expect that his doctrines and theories will be entirely accepted without reserve, yet he can certainly demand that anybody who hereafter enters upon the field of jurisprudence and legal and economic philosophy should first make himself acquainted with his learned and inspiring work.

I refrain intentionally from going into details and criticising Dr. Berolzheimer's views, although there are scores of peculiar, and even some comical, notions and ideas to be found in his work. Works of this kind cannot be criticised in a short article: they must be read and re-read, and their value must be measured as a whole, and not by considering this or that faulty point. Thus English readers will none the less, I am sure, admire Dr. Berolzheimer's work because his statements are occasionally[2] slightly tinged with anglophobia. They will say "Et Homerus dormitat aliquando" when they meet with such and other peculiar passages in this admirable work.

Political Tendencies.—But lest the reader should think I approve of it, I

[1] But nevertheless some valuable systems of legal philosophy are not mentioned, as, for instance, Ludwig Knapp's *System der Rechtsphilosophie* (1857).

[2] See, for instance, vol. iii. p. 259.

must draw his attention to one trait of this work which marks almost every part of it, and diminishes considerably its value: its political tendencies. Dr. Berolzheimer claims for legal and economic philosophy the task of a pathfinder in practical politics, and he frequently therefore poses as a politician. The consequence is that he enters the arena of party politics, and that he fights with the weapon of the party politician, although he believes that he is wielding the sword of the philosopher. Does he aim at the laurels of Friedrich Julius Stahl, the intellectual leader of the Prussian reactionary conservative party between 1850 and 1860, whose three volumes on the *Philosophie des Rechts* which first appeared in 1830 and have gone through many editions, are still the political gospel of the right wing of the Prussian conservative party? It is true Dr. Berolzheimer is not the follower of any one political party. But he nevertheless is a party politician because his arguments are those of this species of the genus *Homo sapiens*, and he would not seem to be disinclined to form a political party of his own.

Legal Philosophy and Political Aims.—I do not know what attitude German jurisprudence will take up towards this political trait of Dr. Berolzheimer's great work. English and American jurisprudence, whatever they will have to say to the many merits of this work full of stupendous knowledge, will, I am sure, refuse to assign to legal philosophy any other political task than to lay bare the political principles of certain legal institutions. The discredit into which the theory of the law of nature has fallen was not only due to the fact that we have come to the conviction that there is no natural law, all law being necessarily and unavoidably positive, but also to the fact that from the time when it first arose to the day it vanished it was the vehicle of political aims. It proved an adequate weapon in the hands of the rationalist, as well as in the hands of the champion of Roman Catholic state philosophy. De Bonald,[1] Joseph de Maistre,[2] Lamennais,[3] the Swiss Karl Ludwig von Haller,[4] the Germans Adam Heinrich Mueller[5] and Karl Ernst Jarcke[6] are the most prominent of the latter type. If through the influence of Dr. Berolzheimer's

[1] See his *Théorie du pouvoir politique et religieux dans la société civile, démontrée par le raisonnement et l'histoire* (1796); *Législation primitive considérée dans les derniers temps par les seules lumières de la raison* (3 vols. 1802, 5th ed. 1850); *Essai analytique sur les lois naturelles de l'ordre social* (1817).

[2] See his *Essai sur le principe général des constitutions politiques* (1810); *Du pape* (1819).

[3] See his *De la religion considérée dans ses rapports avec l'ordre politique et civil* (2 vols. 1825-6). But Lamennais's ideas underwent afterwards a great change, and in his book *Paroles d'un croyant* (1834) he does no longer appear as a champion of Roman Catholic state philosophy.

[4] See his *Restauration der Staatswissenschaften* (6 vols. 1819-25).

[5] See his *Die Elemente der Staatskunst* (1809); Von der Nothwendikeit, *Einer theologischen Grundlage der Staatswissenschaften* (1819); *Die innere Staatshaushaltung systematisch dargestellt auf theologischer Grundlage* (1820).

[6] See his *Die Französische Revolution von* 1830 *historisch und philosophisch beleuchtet* (1831); *Vermischte Schriften* (1839-54).

stimulating work we are to see a revival of legal philosophy imbued with political aims, we shall within a generation have a score of works fighting against one another, because the political basis they start from and the political aims they look forward to represent eternal contrasts. But it is to be hoped that the successors of Dr. Berolzheimer will not follow him into the political arena. Legal philosophy must decidedly try to lay bare the religious, ethical, economic, sociological, and ethnological roots of legal institutions; must define the influence of political ideas upon the development of these institutions; may certainly endeavour to indicate the direction and tendencies of their future development. But if legal philosophy tries to do more than this, and to fight for and against certain political ideas, it leaves the safe ground of jurisprudence, and embarks in the unsafe vessel of party politics. However this may be, there is, I believe, no danger that we in England or America should give way to the temptation to follow Dr. Berolzheimer in this point. English and American jurisprudence which has gone through Austin's school will stick to legal philosophy as a philosophy of the positive law, although it will gladly learn from Dr. Berolzheimer how to deepen and to widen its purely philosophical part or parts.

RECOGNITION OF FOREIGN COMPANIES.

[*Contributed by* W. F. Hamilton, Esq., K.C., LL.D.]

There is an increasing tendency on the part of capitalists to carry on operations of trade, business, and commerce in foreign countries. This tendency arises from many causes, financial, political, legal, and fiscal. Some countries have a superfluity of capital which can only find profitable employment in other countries. This has been the case pre-eminently with the United Kingdom, and we find British capital invested in every part of the world. Then capital is very timid, and if socialistic or collectivist legislation is introduced or threatened in one country, capital is withdrawn from that country and transferred to other countries where no such laws exist. Again, the imposition of protective duties in foreign countries may seriously cripple home industries by preventing the products of those industries either wholly or partially from gaining access to those countries.

Advantages of the Company for Foreign Trading. — Undoubtedly experience has shown that the most convenient method of carrying on trade or business abroad is through the medium of incorporated associations or companies. This is particularly the case in countries where the laws are based on Roman law and testators are only permitted to dispose by will of a small part of their land, houses, and other immovable property situated in those countries. Thus if an Englishman is carrying on the business of ranching in Argentina on his own estancias or estates, and dies, only a small part of his estates will pass by his will, although at the time of his death he is a domiciled Englishman. If, however, he carries on the same business by means of a company in which he owns either legally or beneficially the whole of the share capital, then at his death, although the greater part of the company's assets consists of land, all its shares, being personal estate, will pass by his will.

In some countries, as in Belgium, the laws affecting companies permit of bonus shares being issued to promoters of companies, so that financiers find it more convenient to form Belgian companies for carrying out important schemes, as they can more easily make larger profits. In other countries the requirements of the law with reference to the formation of companies and the issue of their shares and obligations are so stringent as to deter company promoting. Thus cases have been known in which German financiers have formed English companies for carrying on business outside

Great Britain in which all the capital was held by Germans, the board meetings were held in Germany, and their only connection with England was the fact that their registered office was in that country.

There are probably thousands of companies incorporated in England which carry on their main business in foreign countries or in British colonies or possessions. Thus in South America almost all the railways and tramways are owned by English companies. On the other hand companies incorporated abroad carry on trading, banking, and commercial operations in this country, but the number of such companies is comparatively small.

Conditions of Recognition: Land-holding.—In many countries foreign companies are fully recognised as legal or juridical persons. They may sue and be sued, acquire, hold, and dispose of all kinds of property, and within the limits of their regulations and statutes exercise full contractual powers. In some countries it is necessary before a foreign company can carry on business that it should be inscribed in the registry of commerce. There are other countries which do not permit a foreign company to hold land or other immovables within those countries unless authorised to do so by a special law or by the executive. Under English law, if any land is transferred to or for the benefit of, or is acquired by or on behalf of any corporation (including any foreign incorporated company), otherwise than under the authority of a licence from the King or of an Act of Parliament, the land is liable to be forfeited to His Majesty. The English legislation upon this subject began as far back as the reign of Edward I. The object of this legislation originally was to prevent land being acquired by ecclesiastical corporations and the Crown being deprived of feudal services. The law does not affect trading companies incorporated in England, because under the general Companies Acts they are authorised to acquire and hold land. A foreign company, however, if it desires to acquire land in England must either obtain a licence from the Crown or a special Act of Parliament enabling the company to hold land. The necessity of obtaining a royal licence or a special Act of Parliament is sometimes obviated by the foreign company procuring a small private company to be incorporated in England for the purpose of acquiring and holding the land, the foreign company and its nominees holding all the shares in the English company.

Under the Portuguese Civil Code the power to hold land conferred upon such trading companies as are capable of perpetual existence is of a very limited character. In order to hold and dispose of land freely they must obtain authority under a special law.

Having regard to the fact that in some countries no restrictions are placed upon foreign companies acquiring, holding, and disposing of any kind of property, and carrying on any trade or business and entering into or enforcing the performance of contracts, and that in other countries

foreign companies are under serious disabilities, the question under wha conditions a foreign company should be recognised has become one of international importance.

In most countries legislatures, in view of the fact that companies are the creation of law and have only such powers and rights as are conferred by law, take precautions for the protection of the public. Certain conditions have to be complied with before a company can be incorporated, and in order to raise capital by the issue of public prospectuses it is sometimes demanded that full disclosure shall be made of all material contracts and facts which would be calculated to influence the mind of intending investors and that the prospectuses shall be registered in a public office. Then, again, laws are made regulating the issue of debentures, debenture stock, or other obligations of companies, and providing for their public registration. Sometimes, as in France, laws are passed with relation to the negotiation and sale of the shares and securities of companies in the stock exchanges or bourses. Some systems of law require that balance-sheets shall also be registered so as to give the public an opportunity of ascertaining the financial position of companies.

It appears desirable that in regard to these matters a foreign company should not be exempt from regulations which are incumbent upon native companies. Thus in England the shares and obligations of companies incorporated under the Companies Acts can only be offered for public subscription upon and subject to such conditions as to disclosure and otherwise as are calculated to protect the public, without at the same time unduly interfering with the raising of capital for industrial and commercial enterprises. Singularly enough, however, any foreign company may issue prospectuses in England offering its shares and obligations for public subscription without complying with any of these conditions.

The question of the recognition of foreign companies is sometimes provided for by the laws of those countries, especially in the case of countries whose systems of law have been codified. As between different countries the matter is often dealt with by treaties providing for the reciprocal recognition of companies respectively formed in the treaty-making states. In England there are no laws dealing with the matter.

Risks of Investors.—The question is of vital importance to investors, because, having invested in the shares or obligations of companies incorporated in their own country for trading abroad, they may find that in a foreign country the company of which they are members or creditors is an illegal company, so that it is unable to retain its property in that country, being treated by its Courts as having no rights capable of being enforced. For example, there was a well-known case in France in which a company was duly formed under the English Companies Acts for the purpose of acquiring land in the South of France. It was decided by the French Courts that as the capital was held principally by Frenchmen and

most of the directors were French, it was a French company, and had been formed in England for the purpose of evading the French Company Law and was therefore illegal, so that innocent shareholders were deprived of all their rights in that company.

Then, too, a person may invest in the shares of a company in which his liability is limited to the amount for the time being remaining unpaid on his shares, so that if his shares are fully paid the most he can lose is the sum which he paid for them. But the foreign country in which it carries on business may by its laws refuse to recognise any limitation of the liability of a shareholder to the creditors of the company. Thus by the laws of California every shareholder of a company, whether a native or foreign company which transacts business in that State, is personally liable in proportion to his shares for the debts incurred by the company while he is a shareholder. It has been held in England that such a liability cannot be enforced against a shareholder of an English limited company residing in this country merely because acting under its memorandum of association it caused itself to be registered in California and carried on business there (*Risdon Iron and Locomotive Works* v. *Furness*, [1906] 1 K.B. 49). If, however, any shareholder held property in California the liability could have been enforced against him. Some two or three years ago it was decided in one of the states of South America, although its civil and commercial codes provided for the recognition of foreign companies, that a company was illegal because the provisions of its civil code as to the incorporation of companies had not been complied with. Fortunately the decision was reversed, but if it had been upheld hundreds of millions of capital held by shareholders in English companies would have been liable to confiscation and forfeiture. While on the one hand it is too much to expect that every foreign company should be unconditionally recognised, it is very desirable that a company should, subject to the restrictions applying to native companies, be permitted to exercise the same powers and have the same rights and be subject to the same liabilities as if it had been duly incorporated in every state in which it carries on business.

An International Code.—The question was considered at a conference of the International Law Association held at Antwerp in 1903, and a committee was appointed for the purpose of preparing a draft international code dealing with the subject. This code was prepared and considered at the conference held at Christiana in 1905, and with some modifications was finally approved at another conference held at Berlin in 1906. This code is in the following terms:

1. Any foreign company duly incorporated shall be recognised in [ ] in the same manner as if it had been duly incorporated in [ ].

2. A foreign company shall be deemed to be domiciled in the country in which it was incorporated, and the liability or non-liability of any member of such company in respect of its acts or contracts shall be determined by the law of its domicile.

3. A foreign trading company upon complying with the provisions hereof may commence and carry on its business by means of any branch established in [ ] in the same manner and under and subject to the same conditions and restrictions as if it were a company duly incorporated in accordance with the law of [ ].

4. A foreign trading company may only so carry on its business in [ ] by its attorney or agent duly appointed by a notarial instrument so as to bind the company. Any person so appointed must be resident in [ ], and he shall only be able to exercise such powers as are specifically conferred upon him by the instrument appointing him. Where more than one person is appointed the appointment may be joint or joint and several, and the powers and authorities conferred upon such persons may be in respect of the same or separate matters. Every act or contract done or made and every deed or instrument executed or signed by any such attorney within the limits of his authority shall be binding upon his principal.

5. Before any foreign trading company commences business as aforesaid in [ ] the company shall cause to be registered in the place or places where the statutes of a native company must be registered (1) a notarial certificate verifying its incorporation; (2) notarially certified copies of its statutes and of the said power of attorney; and (3) the address of its proposed office or place of business in [ ]. If the company after having commenced business as aforesaid shall alter its statutes or revoke in whole or in part the said power of attorney, or grant any other power of attorney it shall cause such alteration, instrument of revocation, or power of attorney to be also registered within [ ] days after such alteration or revocation or the granting of such power.

6. At such registered office or place of business legal process of any kind may be served upon and notices of any kind may be addressed or delivered to the foreign trading company, and such service and notices shall be valid for all purposes.

7. Every power of attorney granted by any foreign trading company as hereinbefore mentioned shall, as between the company and its assigns on the one hand, and third persons dealing with the company and all persons claiming through or under such persons on the other hand, continue in force, notwithstanding that such power has been revoked until notice of such revocation has been registered as aforesaid or the person dealing with such company has had notice of such revocation.

8. A certificate given by a notary public domiciled and practising in the country in which a foreign company has been incorporated stating that it is duly incorporated in accordance with the laws of such country shall be conclusive evidence that such company has been duly incorporated.

9. In the preceding articles "foreign company" means any association, company, or corporation incorporated outside [ ]; "foreign trading company" means any foreign company formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company; and "statutes" includes any memorandum and articles of association, special Act of the legislature, charter or other instrument by which a company is incorporated, and the statutes, regulations, and by-laws of such company.

The Companies Bill, 1907.—Somewhat similar provisions are contained in the New Zealand Companies Act, 1903. In the Companies Bill introduced in the House of Lords this session, provisions have been inserted making it obligatory for every foreign company which after the commencement of the Act establishes a place of business within the United Kingdom to file with the Registrar of Joint Stock Companies a copy of its charter or statutes

and a list of the directors of the company, together with the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of any notices required to be served on the company, and to file annually with the Registrar such a statement of its affairs in the form of a balance-sheet as is required of companies established in the United Kingdom; and if it uses the word "Limited" as part of its title, to add to its title the name of the country in which the company is established.

THE COLONIAL CONFERENCE AND NATURALIZATION.[1]

[*Contributed by* E. L. DE HART, ESQ., M.A., LL.B.]

IT is more than eight years since the late Viscount Ridley, then Home Secretary, appointed an Inter-departmental Committee to report upon the doubts and difficulties which had arisen in connection with the interpretation and administration of the British Naturalization Acts; and six years ago the Committee presented their report, which contained a number of important suggestions. One of these related to a question of special importance to the colonies, viz. the question of what may conveniently be described as "Imperial naturalization." At present, as is implied in s. 16 of the Naturalization Act, 1870, it is no doubt correct to say that the privileges conferred by naturalization under the laws of a colony can only be enjoyed within its borders. (Such naturalization is called by the Inter-departmental Committee "local naturalization," a convenient phrase which I propose to use in this article.) Therefore a person naturalized in a British possession ceases to have the status of a British subject the moment he quits its territory. He may have had a distinguished public career in the land of his adoption,[2] yet if he takes up his abode in this country, he must, in general, remain an alien for at least five years, before he can regain the status of a British subject.[3] Similarly if he goes to reside in another colony, he must comply with the conditions as to residence which its naturalization laws impose, before he can again acquire that status. There are more ways than one of dealing with this hardship. The laws of some colonies have enacted that previous naturalization elsewhere may be recognized in the colony; for instance, the Canadian Naturalization Amendment Act, 1907, dispenses with the qualifying period of residence in the case of applicants who have been naturalized in the United Kingdom or in another colony. The best solution of the difficulty is, however, by instituting Imperial naturalization, obtainable

[1] *Authorities:* Report of the Inter-departmental Committee on the Naturalization Laws, 1901; Minutes of the Proceedings of the Colonial Conference, 1907; Papers laid before the Colonial Conference, 1907.

[2] Dr. Smartt cited at the Conference, as an example, the case of the late Colonel Schermbrucker, who had been naturalized in Cape Colony and had become a member of the colonial Ministry.

[3] A certificate of naturalization may, however, be granted to an alien who has been five years in the service of the Crown, if he intends either to reside in the United Kingdom or to continue in the service of the Crown.

in any part of the British dominions in compliance with certain uniform conditions, and conferring the status of a British subject everywhere in the British Empire. The principle of Imperial naturalization was adopted by the Inter-departmental Committee, who said in their Report: "We see no reason why, if conditions substantially identical with those which qualify for naturalization in the United Kingdom are fulfilled by aliens residing in any other part of His Majesty's Dominions, the Government of the possession in which the alien has satisfied these conditions should not have power to grant, or to recommend to the Home Government the grant of complete naturalization as a British subject." For the purpose of carrying out this recommendation they suggested

(1) that when the conditions to be fulfilled by aliens in order to obtain local naturalization in a colony are substantially the same as are required for naturalization in the United Kingdom, the Governor should be empowered by Order in Council to grant certificates of naturalization giving all the rights conferred by naturalization in the United Kingdom;

(2) that in the case of British possessions in regard to which no such Order in Council existed, the Governor should have power to recommend to the Home Government for naturalization any alien who had satisfied within the possession conditions identical *mutatis mutandis* with those required for naturalization in the United Kingdom, and that certificates granted in accordance with such recommendations should confer all the privileges of British nationality both within and without the British dominions.

Another matter which also affects the colonies is that by reason of the obscure and contradictory wording of s. 7 of the Naturalization Act, 1870, there is a difference of opinion as to the effect outside the limits of the United Kingdom of a certificate of naturalization granted under the Act. One view is that the operation of the section is confined to the United Kingdom,[1] the other is that naturalization under the Act of 1870 confers the status of a British subject everywhere (except within the limits of the foreign State of which the naturalized person was previously a subject, if he be still regarded there as a subject). It may be inferred from the language of Lord Elgin's Circular of December 14, 1906, to the colonial Governments and from some of the speeches at the late Colonial Conference that the latter view, which I believe to be the right one, now prevails in the Colonial Office and in the self-governing colonies; but in 1874 the law officers advised that a certificate of naturalization granted in the United Kingdom has no effect in

[1] The possibility that this is the correct view is no doubt the reason why the laws of some colonies provide for the grant of certificates to persons naturalized in the United Kingdom, and why the Transvaal Ordinance, No. 10 of 1904, expressly declares that persons naturalized in the United Kingdom shall have all the rights in the colony given by the Naturalization of Aliens Ordinance, 1902.

the colonies.[1] The Inter-departmental Committee drew attention to the doubtful construction of the section without expressing any opinion on the point. They recommended, however, that a person naturalized in the United Kingdom should be a British subject "everywhere and for all purposes," subject of course to the principle that the law of this country cannot divest a person of any status existing under a foreign law, and ought not to purport to do so.

A third defect in the present law is that under the Act of 1870 naturalization can only be acquired by a person who intends either to reside in the United Kingdom or to serve under the Crown. Consequently the Act does not enable a certificate to be granted to an alien, however long he may have resided in the United Kingdom, if it be his intention not to remain there, but to emigrate to a British colony. The Inter-departmental Committee recommended that the condition should be altered by making an intention to reside anywhere in the King's dominions sufficient.

Some discussion on the proposed alterations in the law of naturalization took place at the Colonial Conference of 1902, but it revealed certain differences of opinion, and no definite conclusion was reached. Afterwards, however, a Bill was drafted, and then the matter remained in abeyance, until it was revived at the late Colonial Conference, at which the draft Bill was discussed. It is desirable to set out in full the sections which deal with the status of persons naturalized in the United Kingdom, or are intended to establish a system of Imperial naturalization. They are as follows:

S. 7. An alien who, within such limited time before making the application hereinafter mentioned as has been under any Act hereby repealed, or may be allowed by the Secretary of State, either by general order or on any special occasion, has resided in His Majesty's dominions for not less than five years, or has been in the service of the Crown for not less than five years, and who intends, when naturalized, either to reside in His Majesty's dominions or to serve under the Crown, may apply to the Secretary of State for a certificate of naturalization.

S. 9.—(1) A naturalized person shall be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, duties, and liabilities to which a natural-born British subject is entitled or subject, and shall to all intents and purposes have, as from the date of his naturalization, the status of a natural-born British subject.

S. 26.—(1) Where it appears to His Majesty in Council that under any law for the time being in force in any British possession the conditions to be fulfilled by aliens with respect to naturalization are substantially the same as those required for the grant of certificates of naturalization under this Act, His Majesty may by Order in Council empower the Governor of that possession in his discretion to grant to any person naturalized in that possession a certificate of naturalization in the prescribed form, and that certificate shall have effect to all intents and purposes as if it were a certificate of naturalization granted by the Secretary of State under this Act.

[1] See the Circular to the colonial Governments set out in Sir Francis Piggott's recently published treatise on Nationality, p. 129.

(2) His Majesty may revoke any such Order if it appears to His Majesty that the law of the British possession referred to in the Order has been altered so as to make it inexpedient that the Order should continue in force.

(3) As regards any British possession with respect to which no such Order in Council has been made, or with respect to which the Order in Council has been revoked, the Governor of that possession may, in the prescribed form, and subject to any regulations made by the Secretary of State, make a recommendation to the Secretary of State that a certificate of naturalization should be granted to any specified alien resident or serving the Crown in that possession, and thereupon the Secretary of State may, if he thinks fit, grant a certificate of naturalization accordingly.

It will be noticed that s. 7 would make a great change in the conditions to be fulfilled by an applicant for naturalization. The section substitutes residence in the British dominions, both past and prospective, for residence in the United Kingdom, and it is not even necessary that the applicant should be resident in the United Kingdom at the time of his application.[1] There would possibly be more danger than under the present law that "undesirables" might obtain naturalization, unless very careful inquiries were made as to the character of the applicant in all parts of the Empire where he has resided. Yet considering the great caution exercised by the Home Office in granting naturalization, and the fact that the Secretary of State has an absolute discretion in the matter, the change of the residential qualification need cause no alarm, especially as another section of the Bill proposes to give him power to revoke a certificate obtained by false representations or fraud. It is not probable that the "rolling-stone" or the "undesirable" will obtain a certificate from the Secretary of State. Moreover, the substitution of residence in the British dominions for residence in the United Kingdom seems to be necessary, in order to give effect to the provisions of s. 26 (3).

In considering s. 26 (1) it must be remembered that many of the colonies do not require applicants for naturalization to have resided in the colony for as long a time as five years, and that some of them do not even prescribe any definite period of residence. Would it be necessary for them to alter their existing laws, so as to make the conditions of local naturalization the same as those of naturalization in the United Kingdom, in order that the power of granting Imperial naturalization might be conferred upon them? S. 26 (1) does not seem to prevent any colony from continuing to grant local naturalization under its existing law, while under another law certificates of naturalization are granted to aliens who have fulfilled conditions similar to those required by the British Act. If this be not correct, in colonies which do not wish to give up the right to naturalize aliens who have resided less than five years, Imperial naturalization could only be

[1] Therefore s. 26 (3) seems to be superfluous. It is based on the recommendation of the Inter-departmental Committee, and was a necessary part of their scheme, for they did not contemplate the general provision of s. 7, which enables an alien resident in a colony to apply for naturalization in the United Kingdom.

obtained from the Secretary of State under s. 7 or s. 26 (3). The discussion at the Imperial Conference does not make it clear whether the self-governing colonies are willing, for the sake of uniformity, to make the conditions for obtaining local naturalization identical with those required for Imperial naturalization. It seems, however, desirable that the colonies should have the power to grant full naturalization without prejudicing their right to grant local naturalization on such conditions as to length of residence as they might think proper.

The reception by the Colonial Conference of the proposals contained in the draft Bill was on the whole encouraging. New Zealand proposed a resolution "that the law as to naturalization should be uniform throughout the Empire, and that naturalization, wherever granted, should be Imperial, and not local, subject, however, to the right of any self-governing dependency to impose special conditions if it thinks fit." Cape Colony brought forward a resolution that "this Conference is of opinion that in order to remove anomalies attaching to naturalization of aliens throughout the Empire, His Majesty's Government should, after full consultation with the colonies, take steps to secure Imperial legislation providing for the treatment of the question on a uniform basis." There was, indeed, a consensus of opinion that uniformity should be attained by Imperial legislation, though some provisions of the Bill did not escape criticism. There were only two points, however, with regard to which serious exception was taken to the Bill. One is that there is nothing in the law of this country to prevent the naturalization of persons of bad character. In theory the Home Secretary could no doubt grant a certificate to any foreign gaol-bird who had resided here for five years; but in practice the most careful inquiries are made as to the respectability of each applicant, who is required by the Home Office to give four references as to character. If there is any suspicion of criminality on the part of the applicant, it must, as Mr. Gladstone explained to the Conference, "be dissipated as a condition precedent to his obtaining his certificate."

So far as naturalization in the United Kingdom is concerned, therefore, the fear that criminals and persons of bad character might be naturalized is certainly unfounded. There is probably, also, no reason to think that they would obtain naturalization in any colony, except by means of false statements which would justify the cancellation of their certificates. But there ought to be no difficulty in meeting this objection by altering s. 8 of the Bill (which requires the applicant to adduce evidence of his residence and intention to reside), so as expressly to make it a condition that an applicant for naturalization must satisfy the Secretary of State that he is a person of good character.[1]

[1] Some of the colonial Acts expressly require the production of a certificate of good character, signed by a magistrate or other specified authority: see Canada, Naturalization Act (R.S.C. 113, s. 1), ss. 14, 15; Cape Colony, No. 35, 1889, s. 2; Australia, No. 11, 1903, s. 6; Natal, No. 18, 1905, s. 2; Transvaal, Ordinance 46 of 1902, s. 1 (2).

The most serious objection taken at the Colonial Conference was that the Bill would give persons of non-European races naturalized in one colony or in the United Kingdom the status of British subjects in other colonies where they are disqualified from obtaining naturalization. In Australasia and in South Africa a strong feeling exists against the naturalization of aliens belonging to coloured races, a feeling which has of late years found expression in the legislation of the self-governing colonies. Thus in 1896 New Zealand prohibited the naturalization of Chinese; the Naturalization Act of the Commonwealth of Australia, passed in 1903, excludes aboriginal natives of Asia, Africa, or the islands of the Pacific (excepting New Zealand); and the Natal Naturalization of Aliens Act, 1905, only permits naturalization to be granted to persons of "European birth and descent." In 1904 the Ministry of Cape Colony informed the Home Government that the colony views with disfavour the naturalization of Asiatics, and that unless Imperial legislation is so amended as very considerably to curtail the possible naturalization of innumerable Asiatics and non-Europeans, the colony would be unwilling to recognise the Imperial Statute as a text for determining the operation of colonial naturalization laws generally throughout the Empire. At the Conference General Botha presented a memorandum in which a similar view is expressed. But the objection of the self-governing colonies to the naturalization of coloured aliens was most strongly voiced by Sir Joseph Ward, who said that New Zealand is, and intends to remain, a white man's country. "We are well circumstanced," he continued, "with a fine population throughout, and we want to avoid the mixing-up and the contamination of the races both now and in the years to come, by preserving it for white men to-day, and not allowing any law, whether for the purpose of naturalization or for any other purpose, to interfere with it."

Mr. Gladstone had on an earlier day moved a resolution that "with a view to attain uniformity, so far as practicable, an inquiry should be held to consider further the question of naturalization, and in particular to consider how far, and under what conditions, naturalization in one part of His Majesty's dominions should be effective in other parts of those dominions, a subsidiary Conference[1] to be held, if necessary, under the terms of the resolution adopted by this Conference on April 20 last." He acknowledged the force of the colonial views and professed a willingness to modify the Bill in some way so as to meet them, and at the end of the discussion the resolution was unanimously carried on the understanding that the Home Government should consider what alterations might be made in the Bill and then submit it for further discussion to the subsidiary Conference.

The problem with which the Home Government has undertaken to deal is, therefore, how best to give effect to the objections of the self-governing

[1] A subsidiary Conference is one summoned to deal with matters which cannot conveniently be postponed to the next Conference, or involving subjects of a minor character or such as call for detailed consideration.

colonies to the admission of coloured persons with the status of naturalized British subjects. This could be done simply enough by enacting generally that a certificate of naturalization shall not in any colony confer the rights of a British subject upon any person of non-European race [1] who by the laws of the colony is disqualified from being naturalized there. The Imperial Parliament might, however, as General Botha frankly admitted, "object to such a distinction especially as it is not made in the Act of 1870, under which it may be urged that a person naturalized in the United Kingdom is a British subject in whatever part of His Majesty's dominions he may take up his residence." Possibly considering that the number of Asiatics or Africans who obtain naturalization by reason of their residence in the United Kingdom is, and will no doubt continue to be, infinitesimally small, the self-governing colonies might be satisfied if it were provided that colonial certificates of naturalization granted to persons of non-European birth or descent should not have any effect in any colony where such persons cannot obtain naturalization. Yet it must not be overlooked that under the scheme of the draft Bill not only residents in the United Kingdom, but also residents in any part of the British dominions, might be naturalized by the Secretary of State; and residents in colonies the laws of which do not satisfy the requirements of s. 26 (1) would necessarily have to obtain Imperial naturalization from the Home Government. Therefore the number of non-European aliens naturalized in the United Kingdom might be considerably increased. A third alternative to meet any apprehension on this score would be to provide that an alien of non-European race resident in a colony at the time where he obtained naturalization should not acquire the status of a British subject in any colony where he is disqualified from being naturalized. A modification of the draft Bill on any of these lines would be preferable to General Botha's suggestion that a certificate of naturalization granted in any colony where the Imperial Act has been put in force should have effect beyond the borders of such colony only when granted to a person of European birth or descent. There may be many other colonies (not to mention the mother country) where there is no objection to recognising the naturalization of a coloured person. I believe that the best course would be that which I suggested first, *i.e.* to enact in general terms that naturalization shall not give the status of a British subject to any person of non-European race in a colony the laws of which disqualify him from being naturalized.

[1] The Natal Naturalization Law, 1874, limits the right to obtain naturalization to aliens of "European parentage or descent." There is no definition of the word "European." In the New Zealand Asiatic Restriction Act, 1896, "Asiatic" is defined as meaning "any native of any part of Asia, or of the islands adjacent to Asia or in Asiatic seas," but it is expressly said not to include persons of European or Jewish extraction, nor British subjects who are natives of India.

NOTES.

The Channel Tunnel and International Law.—Dr. Oppenheim contributes to the *Zeitschrift für Völkerrecht und Bundesstaatsrecht*—a new periodical of great promise edited by the well-known jurist Dr. Joseph Kohler—a very interesting article on the Channel Tunnel and International Law. The Straits of Dover being part of the open sea, not subject to any one State, but free alike in time of peace and war to all States, would a tunnel under the bed of it be free also? There are no clear precedents to guide one to an answer; the pearl fisheries of Ceylon which extend beyond territorial waters are peculiar, and the claims of the English Government as to them do not much illuminate the subject. Dr. Oppenheim investigates the subject in the light of principle, and, after reviewing the possible solutions, comes to the conclusion that the "Untergrund" below the bed of the open sea is "herrenlos" and may be the subject of occupation by the States from whose territory the tunnel is driven; and that the construction of the tunnel would amount to occupation. The most interesting part of a valuable article is the discussion of the position of the tunnel in time of war. We do not find an altogether clear answer to all the questions which would arise in the event of France being at war and England being neutral. The whole essay is well worth reading, and not the less because it discusses an apparently remote contingency.

Detention of Untried Prisoners.—The figures which the Judicial Adviser of the Egyptian Government gives in his last report as to the detention of untried prisoners may be recommended to the attention of those who are responsible for our circuit system. It is needless to say that the difficulty of obtaining evidence in criminal cases is much greater in Egypt than in England or in most European countries. But this difficulty is surmounted. Before the establishment of Assize Courts in Egypt, the average period between the commission of the crime and the sentence was 230 days. In 1905 it had fallen to seventy-one days; in 1906 it was only sixty days. "As far as rapidity of procedure is concerned," remarks the Judicial Adviser with just pride, "Egypt, with an average of two months for inquiry and final judgment in all cases of crime, is in advance of many European countries." He adds this interesting note: "Last summer I was in seven continental capitals, viz. Lisbon, Madrid, Paris, Christiania, Stockholm, Copenhagen, and Berlin. In each place I made

inquiries as to the average time required in practice for finally disposing of a case of crime. I found that the average of these seven countries worked out at between three and four months."

Organisation of Bourses.—In the latest Bulletin of the Institut International de Statistique is a very valuable account of the organisation of the chief bourses of the world. It is remarkable how few of them are free; either they contain official elements, or they are under the surveillance of the Government. The code may say "la profession de courtier est libre," but it is not. The same bulletin contains a most interesting account of the Japanese bourses which existed, as to dealings in rice, as long ago as the seventeenth century. One feature of the Japanese bourse is that it is answerable for the execution of the contracts of brokers. Another peculiarity is that "futures" are permitted only for periods not exceeding 150 days. It may be added that in Sir Malcolm McIlwraith's report on legal matters in Egypt is an interesting account of the efforts being made to put the Egyptian bourses on a sound basis.

Salmond's "Jurisprudence."—We are indebted to Mr. J. E. Hogg for the following notice of this book: "The second edition of Prof. Salmond's book, the full title of which is *Jurisprudence, or The Theory of the Law*, has now appeared. It is rare to find an author so successful in bringing out on almost every page of his book the dominant idea of the whole, still rarer to find this dominant idea accurately stated on the title-page. Both these things have been done by Prof. Salmond. The dominant idea is that 'the law is merely the theory of things as received and operative within Courts of justice' (p. 478). Again and again is this insisted on, with varying degrees of emphasis and detail. 'The validity of a legal principle is entirely independent of its truth. It is a valid principle of law, not because it is true, but because it is accepted and acted on by the tribunals of the State. . . . The eye of the law does not infallibly see things as they are' (p. 18). 'Constitutional law involves concurrent constitutional practice. It is merely the reflection, within Courts of law, of the external objective reality of the *de facto* organisation of the State. It is the theory of the constitution, as received by Courts of justice. It is the constitution, not as it is in itself, but as it appears when looked at through the eye of the law' (p. 107). A guiding principle of exposition like this serves as a kind of thread to lead one safely through a labyrinth, or, to vary the metaphor, it is like a single continuous cord holding together otherwise disconnected beads. The result is that, whether the reader agrees or disagrees with every proposition stated, the subject-matter is presented with admirable lucidity, and one great end is gained which more pretentious volumes occasionally fail to gain—the reader is made to think for himself. The author really takes his reader, as it were, with him on a balloon trip, and shows him various sets of facts from different points of view, in this way greatly facilitating that comparison of the differing points of view

which is so essential to a proper study and understanding of jurisprudence —whether it be called 'comparative' or not. The 'practical' person, who prides himself on his knowledge of his own system of concrete law, would gain a vastly increased interest in the one system which he thinks it necessary to study, were he to ponder on and follow up this paragraph (p. 234): 'If an equitable owner can be a trustee, can a legal owner be a beneficiary? As the [English] law now stands, he cannot. But this is a mere accident of historical development, due to the fact that the Courts of common law refused to recognise trusts at all. There is no more theoretical difficulty in allowing that a trustee and his beneficiary may both be legal owners, than in allowing that they may both be equitable owners. Had the Courts of common law worked out a doctrine of trusts for themselves, this twofold legal ownership would have actually existed.' A book written in this style must have an enormous effect in inducing that spirit of rationality among lawyers which is the best and surest guarantee for a wise and gradual, yet insistent, reform of our unnecessarily complicated legal system."

"**Les Fondations en Angleterre.**"[1]—This treatise by a French lawyer on the system of charitable trusts in England, dealing with their historical origin, legal development, and actual present working, is well worthy of the attention of English lawyers; and from whatever standpoint it is considered, the work does the highest credit to its author, who has, by a thorough knowledge of the history of our law, combined with a sympathetic appreciation of its governing principles, produced a singularly lucid and scientific exposition of the subject.

The first section is historical, and traces the genesis of the charitable trust from feudal times when it became identified with the tenure of frankalmoigne up to the establishment of the equitable jurisprudence and jurisdiction over charitable uses which was recognised in the statute of Elizabeth. M. Escarra brings out clearly the fact that the reason for the change which was then made in regularising the conception and to some extent the administration of charities was the need of something to take the place of the religious foundations suppressed under Henry VIII., and provide for educational and eleemosynary purposes under non-ecclesiastical guidance. This need was supplied by the general spirit of active patriotic enthusiasm which was the feature of the Queen's reign. The seventeenth century was remarkable for the number of parochial charities, especially doles, then created, and the eighteenth for the many donations made for general scientific and literary purposes. During the nineteenth century the conception and scope of charities continuously widened; the remaining denominational disabilities were for the most part removed; and education was promoted by the Schools Sites Act and Endowed Schools Acts. At the present time the tendency of the stream of charitable donations seems to favour chiefly

[1] Étude de droit comparé, par Jean Escarra, docteur en droit.

medical aids and institutions. The statute of Elizabeth still remains the principal statutory recognition of the charitable foundation as an object of public interest. The Georgian Mortmain Act, which limited and regulated the form and subjects of charitable gifts, practically continues in the Mortmain Act of 1888, except for its restriction on devises of land which was removed by the statute of 1891. The permanent supervision of charities by a Department of State has been in force since 1853, when the Charity Commission was constituted, and now endowed educational foundations have their own controlling authority in the new Board of Education.

In the second section the author discusses the theory and practice of charitable trusts, formulating a definition of his own which in a succinct form embraces the requisites laid down by our legal authorities, pointing out differences between the English and foreign conceptions, and dealing *seriatim* with the rules governing the creation of such trusts, the cypres doctrine, etc.

The third part, which deals with the public supervision of charities, mainly consists of an excellent account of the system and practice of the Charity Commissioners. The author, in comparing their function with that of the Conseil d'État in France, finds the distinctive characteristic of the English Department in its non-political nature, and in its work being rather organising the working of charities than authorising them, like that of the French authority; he describes the Commission as representing "l'État-Providence" rather than "l'État-gendarme"; and conceives its functions as analogous to that of a "conseil de famille" with the local trustees as "tuteurs" of the French law. In these comparisons M. Escarra has correctly interpreted the principles on which the Commissioners have consistently acted—that local interest and local management are to prevail in the administration of charities, supplemented only by the guiding advice and control of the central body. Finally, M. Escarra discusses the question of the "moral person" in law; he points out that it is the exception and not the rule in England for charities to be incorporated, though all necessary facilities are given for this purpose, and suggests that the English system of individual and personal trustees for charities is worthy of consideration by French statesmen. There is also a chapter on statistics and an appendix with forms of charitable schemes.

One point in his otherwise exhaustive treatment of the subject the author omits to note, and that is that it was a common feature of parochial and municipal charities to be administered by the old municipal corporations till the reforming Act of 1835, and parochial authorities have had the right for about a century of seeing the accounts of parochial charities, and thus becoming acquainted with the method of their application. The right of local authorities to be represented in the management of general local charities has been reasserted by the Local Government

Act, 1894, and the present policy of the Commissioners (in accordance with resolutions of the House of Commons) is to extend this system wherever it is possible.

M. Escarra acknowledges cordially the help he has received from members of the Charity Commission, and it is safe to say in return that from no one will his admirable exposition of English charities meet with more appreciation than from those concerned with the practical administrative work of the Commission.—G. G. P.

Funeral Rites.—It would scarcely seem possible to make funerals or interments the subject of an interesting memoir. Prof. Mario Ricca-Barberis, of the University of Turin, has accomplished this in a volume full of instruction, and showing in a striking way the many ramifications of his subject. It touches the deepest religious beliefs. It brings into collision the doctrines *mors omnia solvit* and *non omnis moriar*. It raises legal questions as to personality and its continuance, and the obligations of the heir or representative of the deceased. A commentator on the *actio funeraria* must go far afield; there are scarcely limits to the investigation if it is pursued outside the range of Greek and Roman law, if the subject is examined historically, and if the reasons of the laws which are recorded are sought. One fact will occur to every reader—the meagreness of the literature of the subject in England, and the richness and variety in Germany, France, and Italy. In the hundreds of volumes mentioned in the bibliography, figure only two English works. One of the most instructive chapters is that in which the author discusses the conflicts that may arise between the wishes of the deceased or his representatives and the authorities, central or local, as to the ceremonies at his funeral. The author puts a case which is likely to arise oftener elsewhere than in England, but which is conceivable as possible anywhere: the case of an heir or any representative of a person who has given directions in his will that he is to be buried with certain religious rites; the heir or any representative being of a way of thinking wholly opposed to that of the deceased, and intimating that he intends to disregard these directions; and the populace being likely to make a disturbance. Professor Ricca-Barberis thinks that in such a case the municipal authorities should intervene and insist upon the funeral being accompanied with the religious ceremonies which the deceased desired. Our author is of opinion that there should be summary procedure for rapidly determining such questions; and he would confer such powers on the administration. The drawback to this solution is that in the majority of cases the difficulty would arise from objections raised, not by relations, but by the administration itself in the name of public order. There are some interesting remarks on the differences between Roman law and modern systems of law as to burial; the former regarding the matter as within the sphere of private law, the latter more mindful of hygienic considerations and inclined to place it in the domain of public law. The action of the

Church, fettering the liberty of choice as to this matter, is described. It is a mistake, he contends, to suppose that only to persons who had committed suicide or who were heretics did the Church refuse its offices. Professor Ricca-Barberis enumerates no fewer than ten classes which were so denied, in theory at all events: (1) heretics and schismatics; (2) persons publicly excommunicated or *nominatim* interdicted; (3) suicides; (4) duellists; (5) persons who were killed in bullfights or other spectacular combats with wild beasts; (6) incendiaries; (7) sinners who died in a public condition of impenitence; (8) a large class of persons who had been hardened sinners, including those who had refused the sacrament; (9) those who having exacted tithes had not delivered them to the Church; (10) monks and nuns who possessed property. We have said nothing of some nice juridical questions which a legal writer upon funerals must discuss; for example, the question in what, if any, sense the right of the deceased to determine the disposition of his remains can be said to survive, and how it must be expressed. The little book is a masterpiece of unostentatious research.

Gold Coast: Revocability of Gifts by Natives.—The subject of gifts under the native law of the Gold Coast is evidently full of niceties, as a recent case there of *Kwasi Adai* v. *Kofi Daku* illustrates.[1] The point in the case was whether a gift by a native and by native methods was revocable for good cause, and what acts on the part of the donee would constitute good cause. The Court was divided, but the majority held that it was revocable. The following remarks of Smith J. represent the reasoning and conclusions of the majority of the full Court:

> On the point whether the gift was revocable or not it does appear from part of the evidence of the respondent that it was an absolute gift. The evidence to which I refer is as follows and occurs in the examination by the Court. "The land I gave to defendant I gave to him as his property."
>
> *Q.* "So that he can do what he likes with it?"
>
> *A.* "Yes."
>
> *Q.* "If he likes he can sell it?"
>
> *A.* "Yes."
>
> Later on he explains what he means by saying:
>
> "The land which I gave to defendant I now claim to recover as he wants to claim the whole." This clearly indicates to me that he never intended by his answers to the questions to convey to the Court that he had made an absolute and irrevocable gift of the land to the appellant. And here again the judge of the Court below (Griffith C.J.) was in a better position to judge whether the witness was answering the questions fully understanding their import or, as so frequently happens, was answering without thinking. And in this connection the following statement of Benjamin Adai is significant:
>
> "Defendant said he begged me to beg plaintiff to give him some land to

[1] Communicated by the Gold Coast Local Committee (Frans Smith A.C.J., A. Willoughby Osborne, and T. Hutton Mills).

eat on it"—an expression which I have known used when one asks an owner of land to occupy and cultivate it, the ownership of the land in no way being parted with. Here is a native asking for land of another native, and that land given to him according to native custom. Surely this custom must govern the case. It was admitted by the learned counsel for the appellant that lands are not absolutely given away by natives, and it is for this reason that lands are so frequently and willingly given away by natives. The native knows that the land is still his, and that he can take it back should an adverse claim be made by the person to whom it is given. The person to whom it is given knows that he can use the land as long as he likes provided he recognises title in the owner. No gifts of land would be made by the natives if such gifts are to be taken as absolute gifts. Nor can the custom be said to be inequitable, for both parties know and agree to the terms under which the gift is made. In this case the defendant having through the intercession of Benjamin Adai obtained a portion of the land from respondent, turns round and claims ownership not only to the portion given, but also to that occupied by the respondent by repudiating the sale to Abonua and representing that the cutting of the guaha was fictitious. Before the Court of the Omanhene he claimed the whole land from the respondent, and from the judgment of that Court it is seen that the assertion of an adverse claim under the circumstances is sufficient to justify his being turned off the land. The same attitude he maintained in the Court below, and from the evidence of native experts adduced before that Court it is found that the appellant's conduct justified the action of the respondent and so confirmed the judgment of the Court of the Omanhene. The assertion of an adverse claim and the prosecution of that claim by one who has been allowed to occupy land and use it as against the person from whom he gets the land I have always known to be considered good and sufficient reason to eject the one setting up the claim from the land. This certainly is the native custom that obtains in the Central Province, and from the judgment of the native Court and the evidence of the native expert witnesses the same prevails here. For these reasons I am of opinion, as I have said, that this appeal should be dismissed with costs and the judgment of the Court below be affirmed.

The claim of the donee here was clearly an unconscionable one; but it suggests the reflection how often legal and other controversies arise from the inadequacy of language to interpret meaning.

Labour Laws Bulletin.—For some years past the International Labour Office which has its headquarters at Basle has been publishing in Germany under the title of the *Bulletin des Internationalen Arbeitsamtes*, and in France under the title of *Bulletin de l'Office International du Travail*, periodical summaries of the labour legislation in all parts of the world. The Office has now been able to give for the first time an edition of the Bulletin in English, and the volume can hardly fail to meet with a warm welcome from all those interested in the welfare of the workers. Here, in one comprehensive survey, we may see all the newest phases of industrial development—how Germany is dealing with the employment by parents of their own children; Austria with the protection of life and health in factories and workshops; France with subventions to unemployment societies; England with compensation to workmen for injuries; the Cape with half-

holidays for shop assistants; Natal with immigration; the Transvaal with holidays for miners; the Bahamas with the employment of children under thirteen; South Australia with the wages of women and children in factories; New Zealand with compensation to coal-miners; the Netherlands with housing and accident insurance; Russia with strikes; Switzerland with the hours of work and the training of apprentices. We have here, in fact, an abstract and brief chronicle of a very remarkable movement. "The time is rapidly coming," says Mr. Dicey in his *Law and Public Opinion*, "when the State will, as regards the regulation of labour, aim at as much omnipotence and omniscience as is obtainable by any institution created by human beings." Coming! Has it not already come?

Hindu Marriage and Excommunication.—Loss of caste—with us a figurative expression—has always for the Hindu a very real significance. A recent case, in *The Bombay Law Reporter—Bai Jina* v. *Jina Kalia*—illustrates one aspect of this sentiment of caste—touching marriage. It was a suit for restitution of conjugal rights brought by a husband, and resisted by the wife on the ground that the husband had been excommunicated from the Kharwa community (to which the spouses belonged), and that this being put out of caste and continuing as an outcaste was "very annoying to the whole family." The husband, on the other hand, was for making light of the affair, as if he had only been blackballed at a club; and his attitude had a certain amount of plausibility, because he and his wife and their caste people were in faith Mahomedans, though their manners and customs—as members of the Kharwa community—were like those of Hindus; and therefore the excommunication, though shocking to the orthodox Hindu, would not affect his position as a Mahomedan. He might still attend the mosque, still be buried in the usual burial-ground, and still associate with other Mahomedans outside the community he had offended. That being so, his wife had, he contended, no right to complain, and so thought the subordinate judge. The Court of Appeal were of another opinion. "The effect of the excommunication," said Chandavarkar J., "is that he [the husband] cannot have social intercourse with members of that community in which he was born, to which both he and his wife have belonged, and as members of which they have married. Such social intercourse may be of no moment to him; but the wife pleads that it is of moment to *her*. At the time of marriage she was not only Mahomedan by faith, but also a member of the Kharwa community. Occupying that status she married her husband. Under these circumstances it was of the essence of the marriage contract that they married because they were members of that particular community, and they must be regarded as having entered into the marital relation on the basis of that status." The long and the short of it was that the husband must get himself re-admitted before he could claim his wife's society.

The late Mr. Lely.—By the death of Mr. J. M. Lely the Bar loses a

learned lawyer and accomplished scholar, and the Society a valued contributor. The summaries of legislation of the United Kingdom furnished to the Journal by Mr. Lely were always well informed, accurate, and interesting. Few persons living had indeed such a thorough knowledge of the English Statute Book as Mr. Lely, and *Chitty's Statutes* will long remain an impressive monument to his erudition, his industry, and his quaint humour. Very well worthy of attention, too, are the suggestions for improving the methods of legislation which he continued to press, year after year, taking as his motto the line, "Gutta cavat lapidem, non vi sed sœpe cadendo." They are a legacy now and will bear repetition :

"1. Pass another Sleeping Statutes Bill like that of 1856 to repeal enactments of a similar kind to that repealed by that Act. Our twice-revised Statute Book (which, by the way, in 25 Hen. VIII. c. 10 still authorises an interference with the sewers of Calais) enacts (under an Act recently enforced against Sunday players and directed to be proclaimed quarterly in market towns by mayors and others) that labourers, fishermen and members of other classes named in the 'Bill for maintaining Artillery and debarring Unlawful Games' may not play cards 'out of Christmas,' and under other Acts that elopement with a nun is punishable by three years' imprisonment; that a penniless perjurer must have both his ears nailed to the pillory; that extra-parochial meetings on Sunday for 'any sport or pastimes whatsoever' must not be held (on pain of 'three shillings fourpence' fine, and in default of distress three hours in the stocks); and that disobedience to the Act of Uniformity on a first conviction is punishable by loss of a year's income, and on a third by imprisonment for life.

"2. Take up systematically the consolidation which has been dropped in recent years, and begin by consolidating the Burial Acts, the Death Duties Acts, the Solicitors Acts, the Summary Jurisdiction Acts, and the Parliamentary Elections Acts.

"3. Prepare a breviate to each Bill pointing out (with statistics if necessary) the existing law, the mischief caused by it, and the character of the remedy proposed.

"4. Abbreviate the breviate for purposes of a preamble.

"5. Banish to matters of procedure alone that system of allusive legislation so emphatically and authoritatively denounced in *Knill* v. *Towse*, 24 Q.B.D. 186.

"6. Postpone the operation of each Act, except as expressly excepted, to the expiration of a reasonable and uniform period.

"7. Require amendments to Bills to be always in writing, and to be accompanied by reasons for them.

"8. Where a Bill affects a Government department, procure consideration of it by the chief of that department."

These are not all the suggestions, but they will be enough for our legislators to begin upon.

"Back-fee" in the Punjab.—A full bench—consisting of nine judges—of the Chief Court of the Punjab have recently had before them the question—highly important from a professional point of view—whether a legal practitioner may make his remuneration in a case contingent on the success of the case, or to use the common phrase take a "back-fee"—that is, a fee which is to be paid back in whole or in part if the case fails. In England the traditions of the Bar have long proscribed such an agreement, and s. 11 of the Solicitors Act, 1870, expressly prohibits it as between client and solicitor. In nearly all parts of India also—in Madras, in Allahabad, in Calcutta, and in Bombay—such agreements are not permitted; but the case has been otherwise in the Punjab, where the practice has largely prevailed, owing to a decision some thirty years back of Sir M. Plowden, a judge of high authority in the Province. In his opinion there was nothing against public policy in a stipulation that a pleader should be paid an additional sum by his client on condition of his conducting the case to a successful issue: it was calculated, he thought, to secure to the client a degree of zeal and diligence on the part of his pleader in conducting the case which the client would not otherwise get. There is certainly something in this. But it is from this very stimulus to zeal which the back-fee gives that its dangers arise. It tempts legal practitioners to resort—as experience has proved—to improper means, in order to win cases: more than that, it leads to gambling in litigation, to those speculative actions with which Indian Courts are by no means unfamiliar. It is therefore satisfactory to find that the Punjab Court, with two dissentients only out of nine, have condemned the practice. There is nothing of course inherently disgraceful in it, but in the interests of the profession, in the maintenance of a high standard of honour, it is, well—undesirable.

"Extenuating Circumstances" in France.—The late Lord Coleridge was driving towards his Court one morning in his brougham when it broke down at Grosvenor Square. Fearing he would be late, he called a cab and told the cabman to drive him as fast as he could to the Courts of Justice. "And where be they?" "What! a London cabby, and not know where the Law Courts are at old Temple Bar?" "Oh! the Law Courts, is it? But you said *Courts of Justice.*" To efface this distinction—palpable even to the man in the street—to bring law as near to justice as possible—this is the task to which the legislator is ever addressing himself, and he finds it one of peculiar difficulty in the administration of the criminal law. One expedient is the recognition of "extenuating circumstances." On this system as it works in France, Mr. Henry Boyle has an interesting article in *The Juridical Review*. The severity of the Criminal Code of France at the beginning of the nineteenth century—like that of our own country—defeated itself. Juries would not convict: the law was paralysed. To remedy this, the French code of 1832 required the jury after convicting to ask themselves if there were any "extenuating circumstances," and if they found there were, the judges

were bound to award a milder punishment according to a fixed scale. But the jury were not bound—and are not now bound—to specify what the extenuating circumstances are, or what weight the jury attaches to them, and it has in consequence been difficult at times to discover their propriety, as in the case of the individual who had murdered his sister and cut her body up into pieces, and was found guilty with "extenuating circumstances." "Were the extenuating circumstances," remarked Alphonse Karr sarcastically, "the victim being his sister or his having cut her up into such small pieces?" The formula, in fact, from its generality, gives too much scope to the French sympathy with "crimes passionnels," or cases involving a dramatic situation. But if "extenuating circumstances" are liable to abuse by a too emotional jury, they prevent a worse evil—the impunity which follows an over-severity in the law.

Malabar Law Quarterly.—"It oftens happens," said Bishop Agobardus writing to Louis le Debonnaire, "that five men, each under a different law [Goth, Burgundian, Frank, Lombard, and Roman], may be found walking or sitting together." Even more complex is the state of things now existing in the Cochin State with its strangely mixed population. There are Malayalee Hindus; there are non-Malayalee Hindus—and these of different schools of Hindu law: there are Mahomedans, including Cutchees; there are Borahs; there are Jews; there are Christian converts; there are East Indians; there are Eurasians—and each of these varieties of race and creed has his own little system of law and custom. How to reconcile them all is now among the chief problems before the judges, and the difficulties are well illustrated in such a case as that of *Narayanan Narayanaroo* v. *Kujicutty Kutty*, involving the validity of a marriage between a Malayalee Bramin and a Sudra woman. One way of solving the problem—and it is largely resorted to—is to import whole portions of English common law and equity into the unwritten law of the State; but a law so drawn from exotic sources, whatever its intrinsic merits, has the obvious disadvantage of being alien to native thought and usage. However we may think on this point, there can be no doubt at all that in a situation so pregnant with possibilities of conflict the publication of regular reports of the decisions of the Courts by competent persons cannot fail to be of advantage. The principles on which the Courts are administering justice are thus made known and uniformity of decision becomes possible; nor is publicity without its stimulating influence on the judicial bench. To furnish such reports, and with them intelligent criticism of the legal situation and its developments, is the object of this review; and, to judge from the first number, it is likely to fulfil these functions extremely well.

Children's Courts in Egypt.—In Sir Malcolm McIlwraith's interesting report as Judicial Adviser of the Egyptian Government is an account of the working of Children's Courts in Cairo and Alexandria. "As far as Egypt is concerned," he remarks, "we have no reason to be dissatisfied with the

results obtained"; and certainly the fact that there has been a reduction in prosecutions of children from 7,259 to 3,347 and in sentences of imprisonment all over the country from 482 to 80 is satisfactory. The Judicial Adviser is sensible of one danger incident to the new system—the diffusion of an idea that children are never to be punished. We note that the supervision of youthful offenders is said to have produced "excellent results."

The Probation System in America.—A very instructive memorandum on this subject has been obtained by the Foreign Office at the instance of the Home Office. The probation system originated in Massachusetts as a form of private philanthropy, and so successful has it proved that it has now spread to twenty-eight out of the forty-eight States of the Union, including New York, Michigan, Pennsylvania, Illinois, Colorado, Indiana, Iowa, Nebraska, Wisconsin, Ohio, California, and Minnesota. Children have been the first object of the new method of treatment, but in Massachusetts it has been extended with equal success to adult offenders and prisoners, and the example is pretty sure to be followed by other States. For the system is one which reflects the American ideal in substituting methods of regeneration for punishment. The pivot of the system is the probation officer, and his function is twofold: first, to supply information as to the accused person, his family and surroundings, habits, associates, previous offences (if any), the likelihood of his reformation, and so on, for the purpose of enabling the Court to come to a decision as to the best method of treating him; and, secondly, to exercise supervision over convicted persons released on probation and prevent them, if possible, from relapsing into bad habits. In New York State, which has peculiar difficulties to contend with owing to overcrowding and the presence of a foreign population, the chief probation officer reported that "the parole system has been of inestimable value in assisting convicted and wayward children to work out their own salvation without commitment to an institution." Out of 6,502 children convicted in 1905, 1,188 were released on parole, and of these more than 82 per cent. had so improved that they were finally discharged or released under their suspended sentence. Apart from the saving of self-respect—the foundation of all reformation—which the system secures, there is a financial gain from the earnings of probationers, who are thus enabled to support their families instead of living at the public expense. The Probation of Offenders Bill now before Parliament follows the main lines of the American system, but is rather more precise in defining the conditions which may be inserted in the offender's recognisances and the duties of probation officer, who is to be a sort of combination of the parish beadle and the police-court missionary—an official philanthropist. A new and brighter chapter in our criminal annals should open with this Bill.

Sir Thomas Barclay on International Problems.—This volume is a fitting prelude to the deliberations of the present Hague Conference. It

is a well-considered attempt to find a practical solution for a number of problems of international law now ripe for settlement. The form, too, in which the book is cast makes for clearness and comprehensibility. In formulating each particular problem, whether it is the problem of declarations of war or floating mines, contraband or neutralisation of ocean routes, pacific blockades or the "open door," Sir Thomas Barclay gives a brief history of the question, notes its difficulties, quotes the documents and various views, and ends by contributing his own suggestion, which is usually based on the sound method of applying by analogy to new problems the principles which have been found fruitful in the past. The criticisms which these suggestions of Sir T. Barclay have called forth from learned correspondents—eminent specialists—to whom they have been submitted are not the least valuable part of the book. Among the suggestions is a Draft Arbitration Treaty designed to solve the difficulty of "national honour" and "vital interests"—those perpetual stumbling-blocks in the paths of universal peace. Whatever the practicability of this scheme—which is based on requirement of a stipulated majority for an award—it offers, as a leading authority has said, two great advantages: "(i) time for national feeling to cool down, and (ii) a moral effect that no Power would like to disregard." But even the vision of the nations "lapp'd in universal law" fails to satisfy some people; they are concerned lest the long canker of peace should undermine British manliness. Sir Thomas Barclay has little sympathy with these croakers. He sees no danger of the democracy ceasing to thrill with indignation at the right moment. "The root of human reason gains strength from every gust, and if Western peoples grow more peaceful because more reasonable, this can be no parallel to the historic cases of sybarite or subject peoples emasculated by long periods of non-responsibility."

Incorporation by Reference in Will.—English lawyers may often find in colonial reports valuable commentaries on points of English law. A case of *In the will of Beveridge* in a recent number of the New South Wales State Reports is an instance. The will there provided for division of the testator's property, having regard to any directions concerning the same which might be found amongst his papers at the date of his decease. The directions were in fact in existence at the date of the will, but the question was whether the terms of the will—having regard to the doctrine of law on the subject—were sufficient to incorporate them. The law as stated in Jarman (5th ed. i. p. 99) is that for incorporation "two things are necessary; first, that the will should refer to some document as then in existence; secondly, proof that the document propounded for probate was in fact written before the will was made and was identical with that referred to in the will." Mr. Theobald (5th ed. pp. 63, 64) states the rule somewhat differently. "Any document," he says, "in existence when the will is executed and sufficiently described to enable it to be identified may be

incorporated with the will . . . . It has been said that the document must not only be in fact in existence when the will is executed, but also that it must be described as existing. It would seem, however, that if the document is proved to have been in existence at the date of the will and is sufficiently identified by the description in the will, it is not necessary that it should be actually described as existing." Between these two high authorities the judge—Mr. Justice Walker—had to make his election—for in the case in question the "directions," though in fact existing at the date of the will, were not described as so existing—and upon a very careful review of all the authorities he came to the conclusion that the rule as stated in Jarman more correctly represents the law. No doubt the adoption of this—the stricter form of the rule—may have the effect of sometimes defeating testators' intentions; but the laxer former admits a greater evil—the risk, that is, of giving legal effect to documents or directions which are not properly testamentary.

Sir F. Pollock on Prof. Maitland's Work.—The memoir of the late Prof. Maitland is yet to come, but meanwhile, in the current number of *The Quarterly Review*, we have an appreciation of his work by Sir Frederick Pollock. No one is better qualified for the task. For more than a quarter of a century before Maitland's lamented death they had been "fast friends" and fellow-workers. Sir Frederick Pollock sums up Maitland's position very well when he says: "He was a man with a genius for history who turned its light upon law because law, being his profession, came naturally into the field." His heart burned within him when he saw the wealth of our records—the invaluable materials for a history of the English people—lying, as he says, "unread, unknown, almost untouched save by the makers of pedigrees." His opportunity came with the establishment of the Selden Society in 1887 "to encourage the study and advance the knowledge of English law." "Maitland," says Sir F. Pollock, "was one of the founders: and from the beginning he was in fact the moving spirit of the society's work; later he was its director in form. Thus it came about that Maitland gave us a series of introductions and editions comparable to no other work of scholarship in England than Bishop Stubbs's introductions to the chronicles, and unique in the amount of highly technical work on which they are based. These introductions are brilliant contributions to our historical literature—for they *are* literature, and not only monuments of learning: I believe Maitland could have made literature of Colenso's *Arithmetic*. Shall we dwell on the *Select Pleas in Manorial Courts*, where he robbed the word 'feudal' of its mysterious terrors by showing that the essence of feudalism is not tenure alone, nor jurisdiction alone, but jurisdiction inseparably attached to tenure? or on the delightful rusticity of *The Court Baron*, a book of precedents written in French, probably the working language of the Court in the fourteenth century, if not later, and translated by Maitland himself with minute care? or on the scherzo in the suite, that wilfully and justifiably

comic exposure of the fantastic enigma called *The Mirror of Justices*? But the favourite among scholars, perhaps, should be *Bracton and Azo*, in which Maitland settled the true relations of the treatise we know as 'Bracton' to Roman law and Italian learning. Last came the *Year-Books of Edward II.*, on which Maitland was at work to the end of his life. Most editors would have thought it enough to do the work and preface it with a few pages of general information and notices of interesting cases in the book. Not so Maitland. He not only demolished but pulverised the legend put about by Coke and Bacon that the Year-Books were official and authorised reports, and he investigated the Anglo-French dialect so thoroughly that M. Paul Meyer recommends his introduction to all students of mediæval French. Moreover, he rescued from oblivion a notable professional character, that of Chief Justice Bereford, a strong judge who could be merry on the Bench, though his jests are not always reproducible in polite English." Maitland's humour, which was one of his most delightful characteristics, is a golden thread woven into the fabric of his writing and not to be severed from it, but it glinted forth also in public speech and private talk. It was Maitland who stigmatised the familiar notice-board threatening trespassers with prosecution as a "wooden lie." We have only room here for one sally. Some one had maintained in a private discussion that the householding of future civilisation was to be cænobitic. Maitland was not attracted by the common dining-hall and the collective kitchen. "The best thing I ever heard about heaven," he said, "is that there are many mansions there, and I hope we shall have one apiece."

Burge's "Colonial and Foreign Law."—A short time ago the present writer was conversing with a professor at one of the ancient Universities on the subject of legal literature. "There is one book," said my learned interlocutor, "which has never been re-published, and which ought to be; for it contains what can be found nowhere else—Burge's *Colonial and Foreign Law*." This aspiration has now found its fortunate fulfilment, under the competent auspices of Mr. Justice Wood-Renton and Mr. G. G. Phillimore. But the changes of the Victorian era (Burge dates his dedication, October, 1837) have made it necessary to re-write the book, and even its framework has had to be somewhat altered. Nevertheless, the scientific plan of the original author, who commenced his work with a broad survey of the juridical systems and of the constitutional position of the different colonies and countries, is still followed; and the volume before us deals in detail with this part of the subject. Roman-Dutch Law is treated with great fulness by Dr. Bisschop; and particular mention should be made of the illuminative chapters on Indian Law by the lamented Indian judge Dr. H. M. Birdwood. But no remote or insignificant colony is passed over. The volume ends with an elaborate table setting forth the conditions of appeal to the Privy Council in the various localities. It sounds faint praise to say that the work, when complete, will be indispensable—yet what higher can be

given? We shall look forward with pleasure to the remaining four volumes. There is a portrait and succinct memoir of Dr. Burge (who was grandfather of the present headmaster of Winchester), and a sufficient index. The excellent Table of Authorities contains no reference to Johnson's *Mank's Jurisprudence*, though it is quoted in the text (p. 130).—T. B.

The United States Government and Japan.—In *The American Political Science Review*—a new publication with many good points to recommend it—is an article on the Japanese school question and the treaty-making power by Prof. Herstey. "The writer," to quote a sentence describing his conclusion, "although by no means a strict constructionist, does not believe that the Federal Government has the right, by treaty or otherwise, to encroach upon the police powers or reserved rights of the State to the extent of directing or controlling their public school systems." He relies upon the fact that there are no apt words in the treaty of 1894 with Japan to confer upon her any rights as to education; the words chiefly relied upon—"rights of residence"—do not include education. Even if there were such rights by treaty, the writer argues that they could not override the Constitution. "If there are any constitutional limitations upon the treaty-making power, if the States retain any autonomy whatsoever, they surely preserve the right to the exclusive control of the schools which they maintain out of their resources. What greater trespass upon the province of self-government, what more serious violation of fundamental rights, can be imagined than Federal interference with a State's management of its own schools?"

Parliamentary Suspension in New South Wales.—A member of the Legislative Assembly of New South Wales charged, as Secretary for Lands, with the administration of the Crown Lands Acts, was accused of corruption in his office. Pending his trial the report on the administration of the Lands Department containing findings of misconduct against the Secretary came on for consideration of the House, and the Speaker ruled that the House could not proceed in the matter without prejudice to the member in the criminal proceedings. To meet the difficulty the House passed a standing order empowering the House in such a case to suspend the member from the service of the House "until the verdict of the jury has been returned or until it is further ordered," and, acting on this standing order, the Secretary was suspended, and finally removed by force, from the House. The member thereupon brought an action for assault against the Sergeant-at-Arms (*Crick* v. *Harnett*, 7 N.S.W. St. R. 126), who invoked the standing order in his defence, and the question was thus raised whether such exclusion could be justified either under the Constitution Act, 1902, or under any power inherent in the House itself. The Supreme Court of New South Wales has held that it was not justified under either: not under the Constitution Act, for the power given by it to make standing orders is restricted to regulating the "orderly conduct of the Assembly"; and not under any inherent power, for such

powers are defensive, not punitive, and as Lord Selborne observed in *Taylor* v. *Barton* (11 A.C. 197), "a power of unconditional suspension for an indefinite time or for a definite time depending only upon the irresponsible discretion of the Assembly itself is more than the necessity of self-defence seems to require, and is dangerously liable in possible cases to excess or abuse." In the Chief Justice's opinion the pendency of a criminal charge against a member in no way affected the orderly conduct of the House, and it was inconsistent, he thought, with the British presumption of innocence for the House to say "We will suspend you until your innocence is by the verdict of a jury established, and by so doing ignore the rights of your constituents and practically disfranchise them." It must not be forgotten that the privileges, immunities, and powers of the New South Wales Parliament are more limited than those of the Parliaments of Victoria or of the Commonwealth.

The Duty of Humanity.—A cattle-dealer in the course of his business visited an Illinois farmer, and while there was seized with a fainting fit. A short time previously he had asked the farmer for a night's lodging and had been refused. After recovering somewhat from his indisposition, he renewed his request, but was again refused. Accordingly, with the assistance of the farmer's son the dealer got into his sleigh and started homewards. The following morning he was discovered by a passer-by nearly frozen to death some distance from his home. For this treatment the dealer brought an action against the farmer and claimed damages on the ground that the farmer had been guilty of neglect and wrongful conduct in refusing him a lodging. The farmer's defence was that he owed the dealer no duty to entertain him, and he cited the case of *Union Pacific Ry. Co.* v. *Cappier* (66 Kans. 640), where it is said that though feelings of kindness and sympathy may move the good Samaritan to minister to the sick and wounded at the roadside, the law imposes no such obligation, and suffering humanity has no cause of complaint against those who pass by on the other side. The Illinois Court conceded the general rule, but held that the facts of the case brought it within a wider principle, viz. that whenever a person is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself to avoid such danger. This is substantially the principle enunciated by Lord Esher in *Heaven* v. *Pender* (1883 11 Q.B.D. 509). True it was not assented to by Bowen and Cotton L.J.J., and it is only accepted in a qualified sense by Sir Frederick Pollock in his work on *Torts*, in which he lays it down as law that a person refraining from striving to help another unless he is under some specific duty of action will not in any case be either an offence or a civil wrong. But what says Ulpian?—"Juris præcepta sunt hæc—honeste vivere, suum cuique tribuere, alterum non lædere"; in the words of our Catechism, "to hurt no body by word or deed," and what

is our whole law of torts but an expression, ever widening, of this last precept?

Cyprus and the Privy Council.—Mr. Stanley Fisher, Judge of the District Court of Kyrenia, writes: "Sir F. Pollock in his interesting article in the last number of the Journal on the Jurisdiction of the Privy Council, might have found another instance of its extent and variety in Cyprus. In appeals from Cyprus the Judicial Committee might be called upon to consider (*inter alia*) the Mejélé (the Ottoman Civil Code), the Ottoman Land Code, and the various decrees and regulations emanating from the Sublime Porte, and having the force of law, which were in force in Cyprus on July 13, 1878. As to the law in force in Cyprus, see No. IV. of the Journal, New Series, at p. 86, and also an article on the Ottoman Land Code at p. 141 of the same number."

Company Law for the Empire.—The elaborate Memorandum and Analysis prepared by the Comptroller of the Companies Department of the Board of Trade with regard to the company laws in force in certain parts of the Empire is a very valuable document: an awakening document, for no one can peruse it without being profoundly impressed with the unsatisfactoriness of the present state of things, and with the desirability, as the unanimous resolution of the Imperial Conference puts it, "of a greater uniformity, so far as circumstances permit, in the company laws of the Empire." Here is the United Kingdom with its company law contained in seventeen Acts of Parliament—to say nothing of statutory orders, rules, and forms—and this number likely to be soon increased by another very complex Act. Then there is Canada with nine different systems of company law contained in 75 Acts and Ordinances. Australia with six different systems of company law contained in 46 Acts of Parliament; South Africa with five different systems of company law contained in 21 Acts, Laws, and Ordinances; not to mention India and New Zealand—altogether twenty-two different systems of company law contained in 145 Acts, Laws, and Ordinances: and this is irrespective of the Acts and Ordinances dealing with the subject in the Crown Colonies and Protectorates! Is this bewildering maze of company laws, as the Comptroller justly calls it, a necessary evil? Certainly not. The groundwork of company legislation throughout the Empire is the same. It is based on the Imperial Companies Act of 1862. Many of the amendments of that Act have been adopted in their entirety by different States of the Empire. In many the Imperial Act remains in its original simplicity. Some States have no doubt amended on original lines which are not without their suggestiveness for us—indeed, the new Companies Bill has adopted several; but allowing for such inevitable diversities due to varying needs or local conditions, the main lines of company formation and management throughout the Empire present a remarkable similarity, and it ought not to be found impossible to frame an Act embodying a code of company law which would be acceptable to the Empire generally. But we must be

on our guard against supposing that the Act which is now in contemplation to consolidate the company law of the United Kingdom will be necessarily suitable for such a code. It will almost certainly not be suitable. A company code for the Empire must be based on the common elements to be found in all the different systems, leaving it to each State to engraft on this common stock the provisions which its special exigencies or policy may recommend.

Municipal Baths and Liabilities appertaining thereto.—A question which may come, in these days of municipal activity, before our Courts was lately discussed in the Court of King's Bench at Montreal. Action by a father whose son had been drowned in a public bath established by and under the control and supervision of the city of Montreal; the death being caused, it was alleged, by the fault, lack of precautions, and negligence of the city and its servants. The youth, an indifferent swimmer, dived in deep water; he got into trouble, and the guardian plunged into the water to rescue him. Both were drowned; when found, the guardian had hold of the clothes of the young man, while he held the guardian by the neck. The city was condemned to pay $50,000 damages on the ground that it was in fault because the guardian was unwell, because he had not on a light dress suitable for such an emergency, and because the life-saving apparatus was insufficient. The majority of the Court set aside the judgment, chiefly on the ground that if the guardian had been well, and had worn light clothes, and the life-saving apparatus had been better than it was, there was no reason to be sure that the youth would have been saved. "The city cannot be held liable on suppositions." It does not seem to have occurred to the majority to consider the question whether the municipality owed to those who used its baths any other duty than to see that they were reasonably safe as baths. The implication in the judgment that the municipality was bound to have life-saving apparatus and a proper rescue staff seems alarming to the ratepayer, if reassuring to the bather.

The Sociological Society and its Work.—For countless ages the rich and varied pageant of human history has been unrolling itself, the forces of social evolution "moving on," as Mr. Gladstone once said, "in their majesty and their might"—mystic, wonderful—and sociology is trying to interpret for us the significance of it all—on the hypothesis that society is an organism, the human race a "colossal man," to use Pascal's expression. It is a stimulating conception and one of profound and peculiar interest to the jurist. In the volume just issued by the Society we have a number of valuable contributions to the science—addresses most of them, followed by discussions or written communications. Thus we have Dr. G. A. Reid on "The Biological Foundations of Sociology"; Mr. W. McDougall on "A Practicable Eugenic Suggestion"—which is that parents possessing a "civic worth" should be remunerated in proportion to the number of their healthy living offspring; Mr. A. E. Crawley on "The Origin and

Function of Religion"; Mr. G. de Wesselitsky on the Russian Revolution; Mr. W. H. Beveridge on "The Problem of the Unemployed"; Mrs. Sidney Webb on "Methods of Investigation." In this very excellent paper Mrs. Webb dwells on the importance of obtaining what lawyers would call "the best evidence." The "interview," which is one of her five methods of getting at the facts of life, *e.g.* in East London, should be used not to pick up hearsay or opinions, but to find out the people who really know and are in touch with the facts—Council School visitors, district visitors, Singer sewing machine agents, and so on. This is the way to arrive at reality. The counsel is one which Mrs. Webb does well to commend to students and workers in the field of sociology, because it is so extensive and so little explored. "We are all feeling our way," as one of them says; and the great danger to the new science is lest it should substitute airy speculation for well-verified facts and figures.

The Digest of English Civil Law.—It is gratifying to find that this work of Professor Jenks is steadily progressing. The latest volume, which is contributed by Professor R. W. Lee, deals with particular contracts, and formulates the rules governing them with the care and precision which characterise all Mr. Lee's work. None but those who have tried their hand at this kind of codification can realise what labour and research these definitions represent.

Nautical Assessors and Expert Evidence.—It has been a settled rule in our Admiralty Court from the days of Dr. Lushington that where the Court is assisted by nautical assessors the evidence of nautical experts will not be admitted. The very object of the presence of the nautical assessors is to enable the Court to dispense with other evidence as to the management of ships. If this rule were departed from the assessors' province would be invaded, the Court would be inundated with expert opinions on one side and the other, and great expense would be occasioned to suitors. The Exchequer Court of Canada in a recent case of the *Harbour Commissioners of Montreal* v. *The S.S Universe* have decided that this rule holds good also in an Admiralty Court of the Dominion. The nautical assessor, and the nautical assessor alone, must be relied on by the Court for guidance in all matters within the assessor's proper sphere. In England this system of nautical assessors in the Admiralty Court works extremely well, and it is difficult to see why the system of assessors should not be extended so as to replace the costly and unsatisfactory system of expert evidence in patent cases or cases involving medical, commercial, scientific, or industrial opinion. Ecclesiastical assessors may be summoned under the Appellate Jurisdiction Act, 1876, s. 14.

"The German Civil Code," by Dr. E. Schuster.—The notice of this valuable work has been unavoidably delayed. It will appear in the next Journal.

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